IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,) No. 96-2-15056 SEA
Plaintiff,)
vs.)
AMERICAN TOBACCO CO.; BROWN & WILLIAMSON TOBACCO CORP.; LIGGETT & MEYERS, INC.; LORILLARD TOBACCO CO., INC.; PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO CO.; B.A.T. INDUSTRIES, P.L.C.; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; TOBACCO INSTITUTE, INC.; foreign corporations; and unknown corporations; and JOHN DOE 1 - 100,) and JANE DOE 1 - 100, individuals,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

taken before the HONORABLE GEORGE A. FINKLE, Judge, at the King County Courthouse, Seattle, Washington, beginning at 9:05 a.m., Tuesday, October 20, 1998.

REPORTED BY: Barry Fanning, RPR
James D. Lavielle, RPR
Official Court Reporter
State of Washington

APPEARANCES

For the Plaintiff: JOHN W. HOUGH, Esq.

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5 JON
FERGUSON, Esq.
6
Attorneys General,
7 State
of Washington
8
9 PAUL N.
LUVERA, Esq.
10 Luvera,
Barnett, Brindley,
11 Beninger &
Cunningham
12
13 STEVE W.
BERMAN, Esq.
14 JAMES SOLIMANO,
Esq.
15 Hagens & Berman
16
17 WILLIAM J.
LEEDOM, Esq.
18 Bennett &
Bigelow
19
20 For the Defendant MARY ELIZABETH
McGARRY, Esq.
21 BAT Industries: GERALD
HAUXHURST, Esq.
22 ANDREW T. FRANKEL,
Esq.
23 Simpson, Thacher &
Bartlett
24 STEPHEN M. TODD,
Esq.
25 Todd & Wakefield
03074
1
2 APPEARANCES (cont'd)
3
4 For the Defendant BRUCE M. GINSBERG,
Esq.
5 Hill & Knowlton: Davis & Gilbert
6
7 THOMAS J. BREWER,
Esq.
8 Wickwire, Greene,
Crosby,
9 Brewer & Seward
10
11 For the Defendant REED P.
SCHIFFERMAN, Esq.
12 Lorillard: Lane, Powell,
Spears, Lubersky
13
14 WILLIAM J.
CRAMPTON, Esq.
15 Shook, Hardy &
Bacon
16
17 For the Defendant ROBERT F.
McDERMOTT, Esq.
18 R.J. Reynolds: STEPHEN J.

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KACZYNSKI, Esq.
19 Jones, Day,
Reavis & Pogue
20
21 BRADLEY S.
KELLER, Esq.
22 Byrnes &
Keller
23
24 For the Defendant JAMES R.
MURRAY, Esq.
25 Tobacco Institute: Gordon,
Murray & Tilden
03075
1
2 APPEARANCES (cont'd)
3
4 For the Defendant JOHN W.
PHILLIPS, Esq.
5 Philip Morris: Heller,
Ehrman, White &
6 McAuliffe
7
8 DAN K.
WEBB, Esq.
9 GEORGE C.
LOMBARDI, Esq.
10 Winston &
Strawn
11
12 STEVE
KACZYNSKI, Esq.
13
14 MAURICE A.
LEITER, Esq.
15 Arnold &
Porter
16
17
18 For the Defendant STEVE
McCORMICK, Esq.
19 Brown & Williamson: MICHELLE
BROWDY, Esq.
20 Kirkland
& Ellis
21
03076
1 I N D E X
2 Witness Name D C
RD RC
3 John Solow 3077
4
5 E X H I B I T S
6
7 Exhibit No. Marked
Admitted
3078 3115
3118
8 5020
3259
9
03077
1 Seattle, Washington,

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10/20/98, 9:05 a.m.
MR. FERGUSON: May we proceed?
THE COURT: Yes.
DIRECT EXAMINATION (Cont.)
BY MR. FERGUSON:
Q Good morning.
A Good morning.
Q I'd like to spend 30 seconds or so recapping.
Was the tobacco industry in the United States threatened in 1953?
A In my opinion, yes, it was.
Q By what?
A It was threatened by the emerging news that there was a link between cancer and smoking and it was also threatened by its own competitive behavior at that time.
Q What was the industry's response to those threats?
MR. WEBB: Objection, repetitious, asked and answered.
THE COURT: Sustained.
BY MR. FERGUSON:
Q What year was the incident when United States Tobacco was making it's Dear Doctor letter and there was a response to the TRIC from Philip Morris?
03078
A That took place in 1957.
Q What year was the Barclay incident that we examined yesterday afternoon?
A That took place in 1983, I think. Early '83.
Q I'm going to show you two exhibits we had on the board before. These are Exhibit 13 and Exhibit 61. Look at those, please.
Put 13 up so counsel can see it.
What are Exhibits 13 and 61?
A These are copies of the Viceroy advertisements that I think we looked at yesterday, although somewhat bigger and clearer.
Q For purposes of your economic analyses, you noticed a difference in the two advertisements that are those two exhibits?
A Yes, these as I think we discussed yesterday, these are examples of the pre-1953 meeting

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18 advertisements, this one in particular is the sort of
19 advertisement that was running in 1953 before the
20 companies met at the Plaza Hotel, and it emphasizes
21 health, the health protection of the filter. It
22 refers to it as the Health Guard Filter.
23 Q Bring up the other one, please.
24 This one is post-Plaza, is that correct?
25 A This is typical of what was running in 1954
03079
1 after the meeting at the Plaza took place, and now the
2 emphasis is on pleasure, rather than on health.
3 MR. FERGUSON: May I pass these among the
4 jury?
5 THE COURT: Yes.
6 BY MR. FERGUSON:
7 Q Yesterday afternoon we discussed arrangements
8 in the United States with regard to competition on
9 health, we also discussed an apparent arrangement in
10 Germany.
11 A Yes. My understanding is elsewhere in Europe
12 as well.
13 Q Have you examined competitive practices of
14 any of the defendants in any other countries?
15 A There is a fair amount of material on
16 behavior in the United Kingdom and then in other
17 countries as well.
18 Q Have you examined behavior in Latin America?
19 A Yes.
20 Q Generally speaking, what did you discover
21 when you examined the behavior in Latin America?
22 First of all, what defendants' behavior did you
23 examine in Latin America?
24 A Most of the documents I've seen, in fact
25 perhaps all of the documents I've seen have referred
03080
1 to behavior by Philip Morris and British American
2 Tobacco Company, or its subsidiaries, in Latin
3 American countries.

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Q Did the Latin America documents you reviewed indicate whether those two companies were acting competitively in the various Latin America countries?
A No, they pretty clearly show that the firms were acting collusively, noncompetitively in those countries.
Q Look at a couple of those exhibits, 3234, please.
This is on letterhead of Nobleza Piccardo, addressed to PJC Hazel dated 6 November 1990, starts out, Dear Peter, issues we would like brought up at your meeting with Peter Scheer. Do you have an understanding from your case as to who Peter Scheer is?
A Peter Scheer was an executive of Philip Morris, Incorporated.
Q Who was PJC Hazel?
A He was a member, I believe, of the board of directors of British American Tobacco Company, and he was the man at British American who was responsible for, among other things, the Latin American subsidiaries of British American Tobacco.
03081
Q Do you know whether Mr. Hazel and Mr. Scheer were planning on meeting?
A My understanding is that they planned on meeting, and I believe they actually met.
Q Do you have an understanding of why this letter is being written to Mr. Hazel?
MR. WEBB: Object to the form of the question.
THE COURT: Sustained.
BY MR. FERGUSON:
Q Did Mr. Hazel correspond with Mr. Grant, who wrote this letter?
A Yes.
Q Did Mr. Hazel explain to Mr. Grant what he was going to be doing with Mr. Scheer, if anything?
A Yes.
Q What did he say he was going to be

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doing with
18 Mr. Scheer?
19 A Mr. Hazel wrote a letter to Mr.
Grant and to
20 others, I believe, saying I'm going to have
a meeting
21 with Mr. Scheer, I want to know -- I'd like
to know
22 what issues you think we ought
to discuss.
23   And the various
subsidiaries, the
24 subsidiaries of British American who were
in various
25 Latin American countries wrote back to Mr.
Hazel and
03082
 1 offered their opinions about what ought to
be
 2 discussed at that meeting.
 3 Q Mr. Grant is an executive of a
BAT
 4 subsidiary?
 5 A That's my understanding.
 6 Q Do you know whether he was
responding to Mr.
 7 Hazel's request?
 8 A Yes, I believe he was.
 9 Q Show the highlighted material on
this page.
10   Issues we would like brought up
at your
11 meeting with Peter Scheer. There is
really only one,
12 proper price increases in order that the
industry
13 becomes profitable as soon as possible.
14   Assuming a discussion such as
this were to
15 take place, would that be consistent with
competition
16 or with collusion?
17 A This is clearly consistent with
collusion,
18 this is not competitive behavior. This is
not firms
19 acting in their own independent self-
interest trying
20 to serve the customers, this is firms
working together
21 to raise prices.
22 Q It's price fixing, isn't it?
23 A It's price fixing, yes.
24 Q If we could get Exhibit 6070,
please.
25   Have you seen this document
before?
03083
 1 A Yes.
 2 Q What is it?
 3 A This is a British American
Tobacco document
 4 in which the author lays out on a

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country-by-country
 5 basis what the issues are in each
particular country.
 6 These are Latin American countries, again
Guatemala,
 7 Costa Rica, Panama, lays out what the
issues are and
 8 discusses what might go on in those
countries, so it's
 9 a synopsis, a summary of what is going on
in various
10 Latin American countries BATCo does
business in.
11 Q Under Costa Rica, do issues say
price
12 increases needed to offset costs?
13 A Yes, it does.
14 Q Over here it says not the right
time given
15 status on excise tax increase?
16 A Yes.
17 Q What do you understand BAT to be
doing with
18 this comment about Costa Rican price
increases, are
19 they talking about unilateral price
increases.
20   MR. WEBB: Objection, lack
of personal
21 knowledge.
22   THE COURT: Sustained.
23   BY MR. FERGUSON:
24 Q Do you understand, based on your
review of
25 this document and other Latin America
documents, what
03084
 1 British American was discussing when they
talked about
 2 price increases in Costa Rica?
 3 A Yes. Look at the top, the
document mentions
 4 again, if raised by PMI, that is Philip
Morris, our
 5 response should be, and so forth, so it's a
discussion
 6 of how these are issues that they are going
to discuss
 7 with -- that they anticipate discussing
with Philip
 8 Morris.
 9 Q So based on your review you
believe that
10 British American expects Philip Morris to
raise the
11 issue of price increases in Costa Rica
and British
12 American wants a response, this isn't a
good time --
13   MR. WEBB: Objection, reading --
14   THE COURT: Sustained.
15   BY MR. FERGUSON:
16 Q Move on. Guatemala share price

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agreement
17 extension of present trade terms, their
advertising
18 agreements beyond 1992, then in the middle
says agreed
19 at 100 millimeter cigarettes for Tacasa and
88
20 millimeter cigarettes for, I think that's
Tansa 46.8
21 percent market share.
22 Based on your review of the Latin
America
23 documents, what does this document mean
when it says a
24 share of market agreement?
25 MR. WEBB: Objection as to what a
document
03085
1 means. Lack of personal knowledge.
2 THE COURT: Need more foundation.
3 BY MR. FERGUSON:
4 Q You reviewed the documents from
Latin America
5 which discuss market share agreements?
6 A Yes, I have.
7 Q Do those documents explicate what
market
8 share agreement means?
9 A Yes, pretty clear what the market
share.
10 Q What does market share agreement
in the
11 context of the Latin America documents
mean?
12 MR. WEBB: Objection without
identification
13 of the document.
14 THE COURT: Give more foundation.
15 BY MR. FERGUSON:
16 Q What do you understand 46.8
percent market
17 share to mean?
18 MR. WEBB: Same objection, lack of
personal
19 knowledge.
20 THE COURT: Overruled.
21 THE WITNESS: I understand that to
mean that
22 there was an agreement between these firms
that one of
23 them would have a 46.8 percent market share.
24 BY MR. FERGUSON:
25 Q In a market share agreement where
firms
03086
1 decide that one firm will have a certain
percentage of
2 the market, is that collusive or is it
consistent with
3 collusion or consistent with competition?
4 A Consistent with collusion. In the
5 competitive market firms want to get
whatever market

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share they can, or whatever market share they find
most profitable, but they want to do it independently,
not by making agreements with the other firm or firms
about how they are going to split up the market.
Q Under Panama it says, industry agreement, new
agreement reached between PMI, TISA, local agreement
reached on industry rebates/bonusing.
What are industry rebates, based on your
review of the documents?
MR. WEBB: Objection, lack of personal
knowledge, and foundation.
THE COURT: Sustained without further
foundation.
BY MR. FERGUSON:
Q Is this document talking about prices in
Panama?
MR. WEBB: Same objection.
THE COURT: Sustained.
BY MR. FERGUSON:
Q Go to 6144, please.
03087
Have you seen this document before?
A Yes.
Q This is addressed to Mr. T. M. Wilson. Do
you know who he is, based on your review of the BATCo
organizational charts?
A Yes.
Q Who is he?
A He is another executive of British American
Tobacco, I believe it was Mr. Wilson who wrote to each
of his many people as well and said tell me what you
would like us to -- what the issues are in your
country and what you would like us to discuss. There
is a lot of correspondence with Mr. Wilson and the
subsidiaries.
Q Republic Tobacco Company is who?
A As I understand, it's the British American
subsidiary in Costa Rica.
Q Number three, an increase in the price of
cigarettes is needed to affect cost increases.
Counterargument, not the right

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time to do it,
21 given our current situation with the excise
tax
22 increase decreed by the government.
23 On the previous exhibit there was
a reference
24 to Philip Morris might ask about a price
increase and
25 an indication that it wasn't the right
time. Is this
03088
1 document referring back to that incident?
2 MR. WEBB: Objection, lack of
personal
3 knowledge.
4 THE COURT: Overruled.
5 THE WITNESS: This document, my
understanding
6 is this document is the direct
communication between
7 the subsidiary in Costa Rica and the
British American
8 executives that were responsible for that.
Again, it
9 says issues which could be raised by PMI,
that's
10 Philip Morris, and that those issues are
then
11 summarized on a country-by-country
basis on the
12 document that we were looking at a
minute ago.
13 BY MR. FERGUSON:
14 Q Second page of this thing.
15 This is from Mario Mendez, acting
general
16 manager. He is at Republic Tobacco, is
that correct?
17 A Yes, that's my understanding.
18 Q Let's see, 6146 in the book.
Bring that up,
19 please.
20 This is to Mr. Tim Wilson. Is
that the same
21 person who the other letter was addressed
to?
22 A Yes.
23 Q From Tabacalera National SA who
is Tabacalera
24 National SA?
25 A That's one of the other
subsidiaries, and I
03089
1 would need to look at the very bottom line
to be able
2 to identify which country. It's another
Latin
3 American subsidiary.
4 Q See if we can blow that up.
5 Pretty obscure. I believe it's
Venezuela.
6 Can I see the whole document
again, please?

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 7 A This is the Venezuelan subsidiary
of British
 8 America Tobacco.
 9 Q Dear Tim, issues with
competition. As per
10 your request, our comments on the subject
are as
11 follows. The issues or gripes that PMI may
raise are,
12 and there is, one, Montana label and
trademark
13 protection controversy.
14   Two, possibility of SOM agreement
for
15 Guatemala to enable substantial reductions
in
16 marketing and distribution expenses.
17   Based on your review of the
documents, do you
18 know what the SOM agreement is?
19 A I believe if refers to a share of
the market
20 agreement.
21 Q Number three, extend the present
trade terms
22 and advertising agreements beyond the end
of 1992.
23   Are agreements between Philip
Morris and
24 BATCo, if such were reached, consistent
with
25 competition or with collusion?
03090
 1 A I would say they are consistent
with
 2 collusion. These are agreements about
what referral
 3 of advertising the firms presumably would
undertake
 4 and what sort of discounts they would
give to their
 5 wholesalers, and you would expect to see
firms
 6 competing in a competitive market, you
would expect to
 7 see firms competing vigorously through
advertising,
 8 through discounts to their customers, and
this is
 9 -- these would be agreements to not do
that.
10 Q Reference to August preprice
increase volumes
11 agreed at 100 million cigarettes for
Tacasa and 88
12 million cigarettes for Tansa 46.8 SOM for
the month.
13   Is this a reference to a share
of market
14 agreement between BATCo and Philip
Morris?
15   MR. WEBB: Objection.
Speculation. Lack of

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16 personal knowledge.
17 THE COURT: Sustained.
18 BY MR. FERGUSON:
19 Q SOM in this instance means share
of market?
20 A That certainly is my
understanding of it,
21 yes.
22 Q B, there are no issues that
should be raised
23 from our end.
24 C, areas of agreement where both
companies
25 are working well include bilateral trade
terms
03091
1 agreement in place for the year 1992.
2 Generally speaking, in the
commercial world
3 what are trade terms?
4 A They are the discounts that
firms offer to
5 their wholesalers in order to get them to
purchase
6 their product and market those to the
ultimate
7 consumer, to the consuming public.
8 Q Are trade terms commonly an element
of price?
9 A Yes, they are an element of the
pricing, I
10 would say there is the list price, then
there is the
11 discount, and maybe financing terms. For
example, how
12 long will it extend a cash offering, when
interest
13 would have to start being paid on
outstanding
14 balances, things like that, that's all a
form of price
15 competition.
16 Q Would an agreement on trade terms
between
17 competitors be consistent with competition
or
18 collusion?
19 A It would be collusion.
20 Q Advertising agreement in place
throughout
21 1997, an agreement on advertising between
competitors
22 would be consistent with collusion or
competition?
23 A It would be collusive, it would
be an
24 agreement not to compete on the basis of
advertising.
25 Q Areas of agreement where both
companies are
03092
1 working well include, three, price
increase

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2 negotiations.
3 Is that collusive or competitive?
4 A That is clearly collusive. We would expect
5 firms in a competitive market to independently price
6 in an effort to acquire customers, and to agree on
7 price increases is to agree to suppress very
8 fundamental competition.
9 Q See 6147, please.
10 Tabacalera Latmena SA, 3rd August 1992, Tim
11 Wilson. Is this the same Tim Wilson?
12 A It's my understanding.
13 Q Can we see the bottom of this document,
14 please?
15 Can you make out which country which company
16 is located in?
17 A Not unless you blow it up.
18 Q Blow up that part.
19 This word Panama --
20 A At the very beginning, yes. I believe so,
21 yes.
22 Q See the whole letter here?
23 A I can see Panama on that, easier to see it on
24 the paper.
25 Q Dated 3rd August 1992, by fax, secret.
03093
1 I met with Bob Munson today. This is a
2 summary of the agreement. TMSA eliminates all
3 bonification immediately, introduction offer.
4 Do you know what bonification is?
5 A I believe it's a rebate offer, but I'm not
6 positive about what bonification is.
7 Q Would an arrangement between competitors to
8 eliminate rebate offers be competitive or collusive?
9 A Collusive. It would be agreeing on terms of,
10 the terms, the prices at which firms trade.
11 Q Two, industry will eliminate all rebates two
12 times one in 7, I think that's 15 days, next visit.
13 Is an agreement between competitors with
14 regard to rebates collusive or competitive?
15 A That's collusive.
16 Q TISA and TNSA will stop all new exclusivity
17 immediately. We will exchange list of new

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clients
18 with exclusivity to control this.
19 Do you know what this is
referring to?
20 MR. WEBB: Objection, lack
of personal
21 knowledge.
22 MR. FERGUSON: I just asked him
if he knew.
23 THE COURT: Yes or no.
24 THE WITNESS: I think I know.
25 BY MR. FERGUSON:
03094
1 Q What is the basis of your
knowledge?
2 A Understanding exclusive dealing
arrangements
3 and these exclusive dealing arrangements
are common
4 arrangements.
5 Q Are exclusive dealing
arrangements also
6 common commercially?
7 A They can be, yes.
8 Q Do you know whether exclusive
dealing
9 arrangements are used in the cigarette
business?
10 A Certainly appear to be used in
the cigarette
11 business in Latin America.
12 Q What in the context of this --
well, is an
13 agreement between competitors to not
engage in new
14 exclusive dealing arrangements consistent
with
15 competition or collusion?
16 A Again, it's consistent with
collusion,
17 consistent with firms agreeing about how
they will
18 negotiate with their purchasers, the
wholesalers or
19 the retailers.
20 Q There is another reference to
this
21 bonification here.
22 Number five, to stop all
consignment. What
23 is consignment in commercial practice?
24 A I am not positive what
consignment is in
25 commercial practice, my understanding is
that it's
03095
1 when you sell product for -- you give
products to
2 somebody to sell, and if they don't sell
them it is
3 still your product. Basically the way you
sell
4 something on consignment, you say --

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Q If you're not sure, skip that one.
A I'm not positive.
Q Six. To install only normal dispensers maximum US$50 each.
Is agreement between competitors to limit the amount spent on cigarette dispensers consistent with collusion or competition?
A Agreement to limit the nature of the dispensing equipment would be an agreement about the way firms sell, and I would think of that as a collusive agreement. We would expect firms to make their own decision. This is their own best interest about what is the best way to dispense things, not to negotiate that or agree with other firms about that.
Q Seven. No recruitment of ex-employees. Is that consistent with collusion or competition?
A I think that could go either way, that in itself I think it potentially could go either way.
Q Could there be pro-competitive reasons to not permit recruitment of ex-employees?
A Yes, although usually certainly in this
03096
country there are ways to do that, there are ways to do that without negotiating with your -- with other firms without agreeing with your rivals about doing that. For example, there are noncompete clauses, and those are not uncommon. And there is a good competitive reason for no compete clauses when an employee leaves one company they are not allowed to go to work for a competitor for say a year or three years, or something like that, and there is competitive reasons for that kind of behavior.
To agree with your rival is to take things a step further, but I think that could go either way.
Q Since you said this may have pro-

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competitive
14 reasons, I'll ask you about the other ones.
15 Are there any pro-competitive
justifications
16 for fixing prices?
17 A No.
18 Q Are there any pro-competitive
justifications
19 for market share agreements?
20 A Not that I can think of.
21 Q Number eight. To maintain credit
terms at a
22 maximum of 30 days. What is, in general
practice, a
23 credit term of 30 days?
24 A It's the length of time at which -
- it's the
25 length of time for which the buyer won't be
asked to
03097
 1 pay interest on their outstanding balance,
so the
 2 buyer takes some product, hasn't paid for
it yet, and
 3 they have 30 days to pay before interest
charges start
 4 applying.
 5 Q Is an agreement between
competitors to
 6 maintain credit terms at a maximum of 30
days
 7 consistent with collusion or competition?
 8 A That would be a collusive
agreement, that's
 9 an agreement about one of the important
terms of the
10 purchase, how long -- being able to have
no interest
11 charges for 30 days or 14 days or two
months or some
12 length of time that is equivalent to a
discount that
13 interest charges ordinarily start accruing
and giving
14 people a break, no interest until 30 days,
that's a
15 discount of a sort.
16 So agreeing on how long you are
going to go
17 before you start charging your rivals on
that is
18 agreeing with a kind of discounting.
19 Q Is that price fixing?
20 A That's a variation of price
fixing.
21 Q In general we agreed to comply
with the
22 existing agreements. I think this is an
opportunity
23 to develop a new relationship between
TISA, I'm not
24 sure if it's TNSA, and I hope it will last
for the

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25 next year or so. Bob and myself undertook
the
03098
 1 responsibility to verify any breaks in this
agreement.
 2   From an economic standpoint, is it
important
 3 that cartel members be able to verify
departures from
 4 understandings or agreements?
 5 A Yes, there are incentives or ways
to cheat on
 6 agreements like this. Remember that that
cheating is
 7 to the benefit of the customers, so these
firms have
 8 agreed to restrain their competition on
price, on
 9 rebates, on a variety of things, but they
want to make
10 sure each one of them sticks to it, and
they will
11 monitor that and make sure nobody breaks
rank.
12 Q Could I see 6148, please?
13   Secret, page one of six. File
note, meeting
14 with Philip Morris representatives at
Pennyhill Park,
15 Bagshot on 5 August 1996.
16   Blow this one up.
17   In attendance, Peter Scheer.
You referred to
18 him before. Who is he?
19 A Peter Scheer is a Philip Morris
executive and
20 apparently he is the Philip Morris
person who is
21 responsible for the Latin American
region, he is the
22 president for the Latin American region.
23 Q Rafael Arguelles, Fred Hauser,
who are they?
24 A They are Philip Morris
executives, and also
25 involved with Philip Morris's business
in Latin
03099
 1 America.
 2 Q K. S. Dunt, D. J. Etchells, T.
M. Wilson,
 3 then says BATCo. Do you know who these
individuals
 4 are?
 5 A They are BATCo executives, and T.
M. Wilson
 6 is the person who is sending and receiving
these
 7 various letters.
 8 Q These are BATCo employees?
 9 A BATCo executives who are involved
with the
10 Latin American subsidiaries of BATCo.

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11 Q Guatemala, it says PMI wanted to know BATCo's
12 stance on Montana label trademark issues, that
13 discussion about that.
14   Two. Trademark policy, PMI confirms it's not
15 their policy to register competitive trademarks sought
16 confirmation from BATCo that this was our stance, then
17 there is more.
18   Three. PMI complained that TANASA had
19 lowered the price of LS in the supermarket chain of
20 Paiz in Guatemala City to below that of Marlboro,
21 i.e., from Q6.00 to Q4.10, CF Marlboro at Q4.20.
22   BAT undertook to investigate that with JMW,
23 subsequently clarified as short-term limited store
24 promotion to clear LS stock imbalance, this was run
25 for three weeks and ended 8 August. It follows
03100
 1 precedents in the market from Marlboro and Belmont.
 2   Is one competitor complaining to another
 3 competitor about price cuts of the second competitor's
 4 products consistent with collusion or competition?
 5 A Consistent with collusion. In competition
 6 firms expect they will have to compete on price and
 7 they may be upset about it, but generally speaking to
 8 have meetings about it and complain, the implication
 9 is that they weren't supposed to be doing this, that
10 the price of LS, which I take to be Lucky Strike but I
11 don't know for certain, certainly we know what
12 Marlboro is, that the price of LS was supposed to be
13 above the price of Marlboro and that the BATCo
14 subsidiary lowered the price below, and that was not
15 supposed to happen.
16 Q The previous document made a reference to
17 undertaking to monitor the agreement. Is this an
18 example of what you, as an economist,

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would expect to
19 happen if an agreement were being
monitored?
20 A Yes.
21 Q Secret, page two of six.
Discussion of
22 Salvador. Then there is Panama.
23   One. General agreement on the
principle of
24 the need to close down of factories of
both companies
25 with sourcing in Costa Rica.
03101
 1   Is an agreement between
competitors to close
 2 factories in a country consistent with
competition or
 3 collusion?
 4 A Collusion. Again, we would
expect that a
 5 competitive market firm to make their own
independent
 6 judgments about where is the best place to
produce
 7 their product, what factories to run or
not run, and
 8 firms would make the decision themselves
based on the
 9 profitability, they would decide for
themselves
10 whether they wanted to produce the
cigarettes for sale
11 in Panama from Costa Rica or in Panama or
wherever
12 else they felt like doing it. Here they
are agreeing
13 between themselves on where they will be
producing a
14 product that they are going to sell in
Panama.
15 Q Two. We queried whether the
bonusing on L&M
16 had been stopped in accordance with the
industry
17 agreements, our information is that this has
happened.
18   Is asking whether bonusing has
stopped on a
19 product from your competitor, is that
consistent with
20 competition or collusion?
21 A This is consistent with
monitoring of a
22 collusive agreement. There was an
agreement,
23 apparently an industry agreement to stop
bonusing on
24 L&M, which I take it to be a product,
probably the
25 product L&M, although again could have a
different
03102
 1 name, and this is -- they are checking to

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make sure
 2 that in fact the agreement is -- was being
followed.
 3 Somebody had agreed to do something, wanted
to make
 4 sure that they actually did it. So that is
consistent
 5 with monitoring a collusive agreement.
 6 Q The report on the meeting between
the Philip
 7 Morris executive and BAT executives says,
with regard
 8 to Panama we agreed there was good
cooperation between
 9 both companies.
10   Costa Rica. Go to the highlighted
part
11 there, please.
12   PMI suggested we might look at a
share
13 agreement.
14   Is discussion of a market share
agreement
15 between competitors consistent with
collusion or
16 competition?
17 A Well, it certainly suggests that
they are
18 willing to consider colluding.
19 Q Next page.
20 A That's not a competitive
statement.
21 Q Next page.
22   Regional for CA, two, they wanted
an
23 indication from BATCo of the possibility
of a share
24 agreement in all four countries where we
compete and
25 suggested we exchange concepts by the end
of September
03103
 1 1992, for discussion at a meeting in
October. BATCo
 2 offered to consider this and will revert
with a
 3 proposal if appropriate.
 4   Are discussions between
competitors with
 5 regard to whether to reach market share
agreements in
 6 regions as opposed to countries consistent
with
 7 collusion or competition?
 8 A Again, I think the only way one
can read this
 9 is that there is a suggestion that we talk
about how
10 to split up the markets in these countries,
and that
11 is anti-competitive.
12 Q This is -- is this an uncommon
type of

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13 arrangement, in your experience as an antitrust
14 economist, for members of an industry to agree to
15 share markets?
16 MR. WEBB: Objection. What part? Object to
17 the form of the question.
18 THE COURT: You need to rephrase it.
19 BY MR. FERGUSON:
20 Q In your work in studying antitrust economics,
21 have you seen evidence of cartels where market share
22 agreements were part of the cartel arrangement?
23 A Yes.
24 Q Is that a classic form of antitrust
25 violation?
03104
1 A It certainly is an antitrust violation. The
2 Archer Daniel Midland case, subsequent to the Archer
3 Daniel Midland case that I was involved with Archer
4 Daniel Midland and two other -- two other Japanese
5 companies agreed to split up the world market for
6 lysine, which is a -- l-y-s-i-n-e, which is something
7 that goes into animal feed, and were caught and
8 subsequently convicted and it's a similar sort of
9 sharing the market arrangement.
10 Q See the next page of this, please.
11 Page four, Andean Pack Venezuela. BATCo
12 understanding of level of trade bonusing according to
13 the latest agreement is 1.8 percent. Rafael
14 Arguelles thought the agreement specified 2.5 percent
15 for the Panadarias but was uncertain. Peter Scheer
16 disagreed. PM to confirm.
17 Given discussions of trade bonusing between
18 competitors is consistent with collusion or
19 competition?
20 A Collusion, this is a discount that's offered
21 to customers and this is -- they are having a little
22 bit of an argument, it appears about exactly what they

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23 did agree on in terms of what discounts
they would
24 offer to their -- what bonuses they would
pay to their
25 wholesalers or retailers.
03105
 1 Q Go down to the next part, please.
 2   Price increases, BATCo stated
concern over
 3 the significant growth of the market
segment emerging
 4 in DNP.
 5   Do you know what DNP means?
 6 A No, I'm not certain I do.
 7 Q And cautioned that this would, if
allowed to
 8 spread, destabilize the industry
throughout the
 9 region. PMI agreed with this stance.
10   Is stabilization of an industry a
reason
11 sometimes offered for collusive
arrangements?
12 A It's an excuse, I suppose. I
mean, the real
13 reason we generally believe that
industries want to
14 collude is to raise price or reduce
advertising,
15 reduce discounts, things like that in
order to make
16 more profit. Part of doing that is to see
to it that
17 firms don't cheat on the agreement and
take their --
18 as we talked about yesterday, we need
everybody to cut
19 back, to restrain sales and keep the
price up and so
20 that's part of keeping the price up.
21 Q PMI offered to send written
confirmation of
22 this agreement, which would give the
following price
23 levels. Again, an agreement between
competitors with
24 regard to the prices of their products
is competitive
25 or collusive?
03106
 1 A That's price fixing, that is
classic cartel
 2 behavior.
 3 Q Next page, please.
 4   Is there a page after this?
 5   Mercosur, Argentina. PMI
rejected any joint
 6 move for domestic price increases or
widening the
 7 market gaps.
 8   We talked a little bit about
agreements to
 9 raise prices. Are discussions of the

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price levels
10 without any agreement consistent with
competition or
11 collusion?
12 A I think they are consistent
with collusion.
13 There is a limit on how high a
monopolist or cartel
14 wants to raise its price. If you raise
it too high
15 you drive away too many customers.
There might be
16 other consequences, so the fact that
they rejected a
17 joint move to price increase may mean
that they feel
18 that the agreed upon price is fine right
where it is
19 and they don't want to change that.
20 Q In your review of the documents
did you find
21 any evidence that the either BATCo or
Philip Morris
22 had involved any of the Latin American
governments in
23 the discussions that are reflected in
those documents
24 we just looked at?
25 A There is some discussion about
lobbying with
03107
 1 regard to tax increases and the like.
 2 Q Did you find any indication of
whether the
 3 companies were, or whether BATCo,
rather, took any
 4 efforts to conceal these agreements from
authorities?
 5 A Yes, there is some evidence that
these
 6 agreements were to be concealed, some of
the cases
 7 there were notations that these documents
were to be
 8 kept secret, no records were to be kept and
things
 9 like that.
10 Q We reviewed a number of documents
now with
11 regard to activities between of BATCo
and of Philip
12 Morris in Latin America, and you have
told us that
13 many of those are more consistent with
collusion than
14 with competition. We're talking about
Latin America
15 here. Of what significance -- what
significance do
16 you attach to these documents and
arrangements with
17 regard to the cigarette market in the
United States?

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18 A First of all, I think I would characterize
19 them as being consistent with collusion and not
20 consistent with competition rather than being more
21 consistent with collusion than with competition.
22 To me as an economist what this tells me is
23 first of all of the market for cigarettes in other
24 countries as well particularly these countries is also
25 concentrated, it tells me that the firms are at least
03108
1 in these countries that Philip Morris and British
2 American Tobacco are quite comfortable about getting
3 together with their rivals and negotiating
4 anti-competitive agreements, they are quite
5 comfortable with colluding in these markets.
6 It tells me that we should not be that
7 surprised when we see anti-competitive things in this
8 country as we see with --
9 MR. WEBB: Objection in light of motion in
10 limine that counsel is aware of that.
11 THE COURT: Sustained.
12 BY MR. FERGUSON:
13 Q Do the Latin American documents indicate
14 whether British American Tobacco and Philip Morris
15 know how to conceal evidence of anti-competitive
16 arrangements?
17 MR. WEBB: Object to the form of the
18 question, lack of personal knowledge.
19 THE COURT: Overruled.
20 THE WITNESS: It certainly seems that they
21 know when, that they know to make things secret and to
22 refrain from keeping records of things if they feel
23 that's an important thing to do.
24 BY MR. FERGUSON:
25 Q When you examined the United States market
03109
1 for cigarettes and you see that the geographic market
2 is the United States, did you consider whether

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3 cigarettes from Latin America were possible entrants
4 into the United States market?
5 A I think it's a possibility, at least as a
6 starting point it's a possibility.
7 Q Do these documents that you have discussed
8 shed any light on that question?
9 A Clearly they do for two reasons, one is
10 because as you can see the markets in these countries
11 are supplied by the same producers that are supplying
12 in the United States, Philip Morris and British
13 American Tobacco subsidiaries so it's the same people.
14 And in any event, they are appear to be acting
15 noncompetitively in those countries and why those
16 colluding firms would then choose to compete with
17 their own subsidiaries in the United States doesn't
18 make a lot of sense, doesn't seem very plausible.
19 Q As Monte Python used to say, now for
20 something completely different, back to Barclay for a
21 few moments, Exhibit 617, please.
22 You told us this morning that the Barclay
23 controversy that you were discussing yesterday
24 afternoon was in 1983, is that right?
25 A I can't remember whether that was before or
03110
1 after the objection, that's my understanding it took
2 place in 1983.
3 Q And we saw notes purporting to be a phone
4 conversation between Mr. Bruell and Mr. Cullman?
5 A That's right, we saw those yesterday.
6 Q Did that resolve the dispute between Philip
7 Morris and BATCo resolving or regarding Barclay?
8 A No, that wasn't the understanding, it was --
9 there were subsequent meetings as well.
10 Q This says meet with -- a meeting held with
11 JB, is this 6170.
12 Notes of a meeting held with JB Boder of

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13 Philip Morris on 7 December 1988.
14 MR. McCORMICK: Could we have the exhibit
15 number?
16 MR. FERGUSON: Yes, 6171.
17 MR. McCORMICK: Thank you.
18 BY MR. FERGUSON:
19 Q Following are not intended as minutes or
20 verbatim account of the meeting with you, recorded the
21 salient points of the discussion.
22 Go to the third paragraph, at the outset
23 Boder made clear that PM had been very divided over
24 the approach to Barclays over the previous 8 years.
25 The scientists in Philip Morris had been dominant in
03111
1 the Barclay dispute, no action has been taken in the
2 first year because of these divided views.
3 Skip down to the bottom paragraph.
4 Senior management in PM have issued strong
5 orders to Boder, et al., to settle the Barclay dispute
6 finally within 18 months, they consider they have 3
7 options.
8 Next page.
9 One, to increase the attack in ISO and
10 Coresta.
11 Two, to reach a settlement with BAT.
12 Three, to launch a competitive product
13 themselves. The product is claimed to be available.
14 Then farther says before any settlement can be
15 obtained, three people in PM must agree, Maxwell,
16 Murray and Bible.
17 Who is Mr. Bible?
18 A Mr. Bible is today the CEO of Philip Morris.
19 He was, I believe, at the time an executive at Philip
20 Morris.
21 Q Are discussions between competitors with
22 regard to how one competitors will respond to another
23 competitor's products consistent with collusion or
24 with competition?
25 A That would be collusive.

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Firms selling
03112
1 products in a competitive market will
do the best
2 thing they can in order to acquire
customers, they
3 want to act in their own self-interest
and try to
4 market their product and convince customers
that that
5 is something worth buying, not to work out
6 arrangements with the other firms as to
what they will
7 or won't do.
8 Q Of the three choices that are
discussed up
9 here at the top of this page, are any of
those choices
10 a competitive response?
11 A I would say three is a competitive
response,
12 it's -- the other company has launched a
product that
13 it doing better in the market for one
reason or
14 another. One response, the competitive
response is to
15 try to do that, too, if customers seems to
want that
16 product we'll produce a similar product and
try to get
17 customers for ourselves.
18 Q Based on your review of the
documents do you
19 know whether discussions continued between
BATCo and
20 Philip Morris regarding Barclay?
21 A Before you go on, I think number
one could
22 potentially be --
23 MR. WEBB: Objection, no question
pending.
24 MR. FERGUSON: I'll pose a
question.
25 Q Do you believe that number one
could be
03113
1 consistent with competitive behavior?
2 A Yes, I was going to say -- I want
to complete
3 my answer. I actually think number one is
potentially
4 -- if that is all that happened is
potentially a
5 competitive response, as well, that if one
firm has a
6 competitive product that you believe is
deceptive or
7 unfair and you want to make that point in
8 organizations that set standards, I don't
think that
9 that in and of itself would be anti-
competitive. One

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10 is potentially consistent with competition
as well.
11 Q Which choice did the two
companies make?
12 A They worked to reach a settlement,
they
13 worked to settle an agreement between the
two of them.
14 Q What was the nature of the
settlement?
15 A The nature of the settlement was
that British
16 American was to cease making claims about
the tar and
17 nicotine level of the Barclay product.
Philip Morris
18 was not going to run ads anymore that
involved using
19 smoking and health to gain a competitive
advantage.
20 And there was a part of this agreement was
an
21 agreement about doing testing with regard
to how much
22 tar and nicotine consumers take in as
opposed to the
23 machine calculated levels that the jury
heard a lot
24 about from Dr. Henningfield.
25 Q What do you mean it had to do with
testing?
03114
 1 A As I understand, I heard a little
bit of this
 2 myself and I understand the jury heard a
lot about
 3 this, there is a question about the level
of tar and
 4 nicotine as measured by the Federal Trade
Commission's
 5 machine, the Barclay product was very good
at
 6 generating low numbers on the Federal Trade
Commission
 7 machine but Philip Morris and some of the
other
 8 companies were concerned that they
weren't very
 9 realistic numbers when people actually
smoked the
10 Barclays and compressed the channels,
that's part of
11 what led to this entire thing that Philip
Morris and
12 Reynolds were upset about that product and
how well
13 Barclay cheated the machine.
14   The research involved trying to
understand
15 this compensation issue, British American
was
16 proposing to do some research with real
people to see

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17 how much tar and nicotine they actually consumed when
18 real people smoke real cigarettes and to compare that
19 to the machine, and as part of the agreement to settle
20 this, Philip Morris and Barclay agreed that they would
21 not do that, that that research would be canceled.
22 Q Is that resolution that you just described of
23 the Barclay dispute between BATCo and Philip Morris
24 consistent with collusion or with competition?
25 A Again, it's a collusive agreement, it's an
03115
1 agreement between competitors, between rivals, in an
2 oligopoly, if you will, about how they are going to
3 conduct their affairs.
4 Q Your description of this resolution is based
5 on your review of the documents in this case?
6 A Yes.
7 Q And your application of economic learning and
8 theory to those documents?
9 Bring up 3078, not for the jury, just counsel
10 and the Court, number 3078.
11 Seen this document before?
12 A Yes.
13 Q Was the testimony you just offered the jury
14 based in part on the contents of this document?
15 A Yes.
16 Q And this document is dated January 23, 1989?
17 A Yes.
18 Q Says FTR research and development,
19 Neufschatel, Switzerland. Do you know who that is?
20 A I believe that is the -- says from Mr. Boder.
21 Yes, it's a Philip Morris subsidiary or group
22 that did research in Switzerland.
23 MR. FERGUSON: State offers 3078.
24 MR. McCORMICK: This document hadn't been
25 designated for this or any other witness at least that
03116
1 we have a record of.
2 THE COURT: 3078 was designated for this
3 witness according to the Court's records.

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MR. McCORMICK: Your Honor, I don't have the record here but I believe we objected to this document on the grounds of hearsay within hearsay and that that was sustained. I don't actually have our pleading on this, we don't have it designated.

If Your Honor does, we'll accept that proposition but we apparently posed an objection and would stand on the objection and object.

MR. FERGUSON: Counsel is correct for the basis of their objection.

THE COURT: You need a little more identifying information, if possible, relating to the participants and the witness's knowledge as a participant.

BY MR. FERGUSON:

Q The document indicates a meeting at Gatwick Airport between Mr. Diamond -- do you know who that is?

A Is he a representative of the British American Tobacco Company, at least that is how he is designated here.

Q And L. Reynolds, who is L. Reynolds?

03117

A Reynolds is a representative of Brown & Williamson which is the American subsidiary of BATCo.

Q D. Westcott, who is that?

A Representative of Philip Morris.

Q And JB Boder, you identified Mr. Boder?

A JB Boder is the person from the previous document discussed, he is also a Philip Morris person.

Q What is described in this document?

A This document describes a meeting at Gatwick Airport, which is in London, at which the resolution of the Barclay controversy is finally worked out where BATCo and Philip Morris finally work out how they are going to settle this problem that's been going on for -- this is '89, so 6

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years now, at least 6 years
now.
15 Q I believe
your testimony earlier was
this
16 consistent, the
resolution of this dispute
consistent
17 with collusion or
competition?
18   MR. WEBB:
Objection, asked and
answered two
19 minutes ago.
20   THE COURT:
Overruled.
21   THE WITNESS:
This is a collusive
agreement
22 between competitors,
between rivals.
23   MR. FERGUSON:
State renews the offer of
the
24 exhibit.
25   MR.
McCORMICK: No objection.
03118
 1   THE COURT:
Admitted.
 2   MR. FERGUSON:
Thank you.
 3   Bring that
up, please.
 4   Do we have the highlighted page?
 5 Q Okay, the meeting takes place at
Gatwick
 6 Airport. You said that's in London?
 7 A I guess it's outside of London
but it's the
 8 main, as I understand it the main British
airport. I
 9 think I've been through Gatwick at least
once.
10 Q And Mr. Boder says here I'm
sending you
11 enclosed the firm meetings which were
agreed upon by
12 the participants. My comments are the
following
13 statement of principal is understood by
all
14 participants that no one present has the
authority to
15 make any decision and all proposals made
during
16 meeting will have to be approved by each
manager.
17   Go down here to terms at the
bottom of the
18 page, blow that up.
19   Terms, BAT understands that our
promise not

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20 to start any retrospective litigation is -
- we reached
21 an agreement that it -- if we reached an
agreement is
22 an important step forward, however, they
thought that
23 Swiss case was included in the package.
My answer was
24 that that case was not considered by PM as
being --
25 Next page.
03119
1 Retrospective as it started a few
years ago
2 and it may be technically difficult to
step out since
3 other companies are involved. We were
requested to
4 reconsider our position.
5 Our legal position in Switzerland
should be
6 reviewed in case we reach an agreement so
we have a
7 clear understanding on how to react. BAT
offered to
8 stop promoting the one milligram tar claim
as soon as
9 an agreement is reached.
10 Is this the basis of your saying
that British
11 American decided it wasn't going to
advertise the tar
12 claim with regard to Barclay?
13 A Yes, they offered one. This is
all in place,
14 they will stop making the one milligram tar
claim
15 which is based on the nature of the Barclay
cigarette.
16 Q BAT offered, well, defendants
continues in
17 spite of the fact it will take some
months, years for
18 all national regulation to be modified.
Details of
19 that offer were not discussed but I think
it should be
20 clarified country by country where Barclay
is
21 commercialized.
22 Next paragraph.
23 BAT had planned to help SASO to
make a human
24 smoking behavior study in Saudi Arabia to
show the
25 difference in tar delivery between human
machine
03120
1 smoking for low tar product. These types of
tests are
2 extremely dangerous to the entire industry
and BAT
3 seeks to cancel it.

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 4 Is that the basis of your
description of the
 5 smoke test that BAT decided not to go
forward with as
 6 a result of resolution of this dispute?
 7   A Yes, that's the test I was
talking about is
 8 the test to see whether the tar delivery
between
 9 humans -- and to show the difference in
tar delivery
10 between humans and machine smoking, which
is what Dr.
11 Henningfield, as I understand, talked
about at
12 considerable length and here is British
American
13 Tobacco saying -- here is Philip Morris
saying that
14 these tests are very dangerous to the
industry.
15 I interpret that to mean we don't
want people
16 to know that link, preferable if British
American
17 simply not do that study and BATCo is part
of this
18 broader agreement, agrees not to do the
study.
19   Q Take that document down, please.
20 On the wheel that you drew which
is over
21 there close to you, in the middle you have
in the hub
22 of this wheel TIRC, CTR, committee of
council, lawyers,
23 and TI.
24 In your review of the documents
did you find
25 any evidence that lawyers were
communicating with one
03121
 1 another in regard to supposed violations of
the
 2 understandings to not engage in health
competition?
 3 A Sure, yes.
 4 Q Put up 1550, please.
 5   Says JE Edens, CI McCarty, IA
Pittman,
 6 confidential, Ernest Pepples.
 7   You understand Ernest Pepples to
be an
 8 attorney for Brown & Williamson?
 9 A That is my understanding, yes.
10 Q March 25, 1977, U.S. Tobacco's
general
11 counsel, Jim Chapin. We saw document
regarding U.S.
12 Tobacco yesterday and King Sano cigarettes.
13   Do you know if by 1977 U.S.
Tobacco was still
14 marketing King Sano cigarettes?

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15 A No, I believe U.S. Tobacco got out of the
16 cigarette business, it was still in the smokeless
17 tobacco business.
18 Q And smokeless tobacco is what?
19 A Chewing tobacco, the things you stick between
20 your lip and gum, cheek and gum.
21 Q U.S. Tobacco's generally counsel Jim Chapin
22 sent me the attached article in the New York Post from
23 March 16 reported a most unfortunate interview with an
24 overenthusiastic employee of U.S. Tobacco who is
25 quoted as saying about so-called smokeless tobacco
03122
1 in what we understand, it presents the least possible
2 danger of all, it's when you light tobacco that you
3 start doing damage. Chapin says the statements quoted
4 were unauthorized and do not represent his company's
5 views. He asked to extend U.S. Tobacco's apology to
6 the attorneys of each of the cigarette companies and
7 advises me that the individual quoted in the article
8 is no longer employed at U.S. Tobacco. Chapin says
9 U.S. Tobacco has instituted smoking and health
10 seminars throughout the company.
11 Is a representation by an employee of a
12 smokeless tobacco company comparing that product to
13 cigarettes consistent with competition or collusion?
14 A Well, if it was a truthful representation
15 regardless whether it's truthful or not I would think
16 of that as a competitive type statement. It says in
17 essence our product is better, in this particular
18 instance our product is safer, presents the least
19 possible danger and the suggestion is that consumers
20 ought to switch to our product rather than the product
21 of the other firms.
22 Q That's what competition is?
23 A That's what competition would be all about,

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24 competition on the basis of safety and
health.
25 Q Is terminating the employment of
an
03123
 1 individual who made such a competitive
statement and
 2 apologizing to attorneys for the cigarette
companies
 3 consistent with collusion or competition?
 4   A   I think it's more consistent with
collusion
 5 and certainly in light of what we have
seen about the
 6 arrangements that were in place in the
industry at
 7 this time, it certainly seems consistent
with that
 8 collusive agreement. The industry had a
position that
 9 they would not make smoking and health
claims against
10 their rivals. They are one company or one
person in
11 one company making a health claim about
their product
12 compared to cigarettes, and the company who
employed
13 that person apologizes to the cigarette
companies, we
14 weren't supposed to do that, it shouldn't
have
15 happened, and they fired the guy and
instituted
16 smoking and health seminars throughout
the company.
17   I'm not sure exactly what was
involved in
18 those seminars, the suggestion is not
that they were
19 trying to explain to their employees that
smoking was
20 bad for you but rather that this company
has a
21 position of not making claims like that
and we
22 shouldn't, this was a mistake which
shouldn't have
23 happened, don't let this happen again.
It was an
24 unauthorized statement and it was not the
company's
25 viewpoints.
03124
 1 Q Do you infer anything from this
incident as
 2 to whether United States Tobacco was part
of any
 3 arrangement with the cigarette companies
regarding
 4 smoking and health competition.
 5   MR. WEBB: Objection,
speculation.

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THE COURT: Sustained.
BY MR. FERGUSON:
Q What was the cigarette advertising code?
A The cigarette advertising code was a voluntary agreement that was put into place in the 1960s following the surgeon general's report and it was an agreement by the companies to monitor their own advertising. If was an industry self-regulating agreement.
Q Exhibit 5964. This, is this the cigarette advertising code?
A Yes, the tobacco industry's voluntary cigarette advertising code.
Q Starts cigarette advertising code statement of purposes, the purposes of this code are to establish uniform standards for cigarette advertising and to provide means whereby compliance with this code can be ascertained promptly and fairly and on a consistent basis.
And down here at the bottom is a note that
03125
says enforcement provisions eliminated in 1970.
You understand this code to have been adopted in the early 1960s?
A That's correct.
Q Do you know what the enforcement provisions were that were eliminated in 1970?
A I believe it was the administrator of the code was authorized to levy fines against companies that violated the code, violated the agreement.
Q And this goes to the next page, defines advertising here, let's see.
Here is the code administrator, this is the person you were talking about?
A This is the person who was in charge of seeing to it that -- this was the authority, this is the person who would make the decision as to whether the code was being violated or not.

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18 Q The code administrator, section one, there
19 should be a code administrator who should be a person
20 of recognized independence, integrity, and
21 intellectual achievement to the end that a decision by
22 him shall command public confidence and respect.
23   The administrator shall have all of the
24 powers and authority necessary and proper to enable
25 him to effectively discharge the responsibilities
03126
 1 entrusted to him by this code.
 2 Section two, the administrator shall have
 3 complete and final authority to determine whether
 4 cigarette advertising complies with the standards of
 5 this code and to enforce this code in all other
 6 respects.
 7 Next page.
 8 Under article 3, advertising clearance, section
 9 one, no cigarette advertising shall be used unless
10 such advertising shall first have been submitted to
11 the administrator and determined by him to be in
12 compliance with the standards of the code.
13 Next page.
14 Advertising standards, all cigarette
15 advertising and promotional activities shall be
16 subject to the following, subparagraph D, cigarette
17 advertising shall not represent cigarette smoking as
18 essential to social prominence, distinction, or sexual
19 attraction.
20 Next page.
21 Subparagraph I, cigarette advertising shall
22 not depict the smoker, any person participating in or
23 obviously having just participated in physical
24 activity requiring stamina or athletic conditioning
25 beyond that of normal recreation.
03127
 1   Section two, no cigarette advertising
 2 which makes a representation with respect

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to health
 3 shall be used unless the administrator
shall have
 4 determined that such representation is
significant in
 5 terms of health and is based on adequate,
relevant,
 6 and valid scientific data.
 7   Based on your review of the
documents that
 8 you looked at, do you know whether the
cigarette
 9 companies went to governmental
authorities to get
10 permission to implement the cigarette
advertising
11 code?
12 A Yes.
13 Q Did they?
14 A They did get -- yes, they did
approach
15 governmental authorities to see whether
they would be
16 getting in trouble by making this
agreement. This is
17 an agreement among competing firms, among
rival firms.
18   So the potential for it being an
19 anti-competitive agreement and being
illegal
20 apparently was there and they went to find
out whether
21 they would get in trouble for doing this.
22 Q Do you have an opinion whether
this cigarette
23 advertising code would be consistent with
collusion
24 but for the government's approval?
25 A Well, I think it would depend on
how the
03128
 1 cigarette advertising code was used. I
think that it
 2 was used to resist competition. Remember,
this is an
 3 opportunity for the firms to get together
and agree on
 4 how they are going to behave and if they
agree not to
 5 behave in competitive ways, then the
possibility of
 6 collusion arises.
 7   If, on the other hand, they agree,
they don't
 8 make those sorts of agreements and they
essentially
 9 agree, for example, not to advertise in
frat houses or
10 something like that, one might decide that
-- one
11 might conclude that it was an innocuous
thing to do.
12 Depends how it gets used.

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13 Q Would it be a reasonable thing for the
14 manufacturers to go to the government and ask for
15 approval of a code such as this?
16 A Certainly a reasonable thing to ask.
17 Q Look at Exhibit 5816, please.
18 Says memorandum to file, conference, Department
19 of Justice, June 12, 1964, concerning antitrust
20 clearance for cigarette advertising code.
21 Does this reflect the request for government
22 approval that you were talking about?
23 A Yes. This discusses a meeting that was held
24 with the justice department who enforced the antitrust
25 laws and to talk about this cigarette advertising code
03129
1 as an agreement.
2 Q And Mr. Orrick you understand to be someone
3 from the Department of Justice?
4 A I believe so, yes.
5 Q Do you know who Mr. Fortis is?
6 A I believe that is Abe Fortis who is the
7 famous jurist, famous judge.
8 Q Supreme Court Justice?
9 A Yes.
10 Q And at one time was Mr. Fortis is attorney
11 for the tobacco industry?
12 A It's my understanding, yes, that he was
13 representing the tobacco industry here.
14 Q Mr. Orrick indicates, he stated this thing is
15 more difficult than we had originally anticipated.
16 We're troubled by the lack of standards in the code
17 and by the delegation of enormous power to the
18 administrator. We don't know what agreements may
19 underlie the adoption of the code.
20 Next page.
21 By the way, do you recall who the
22 administrator of the code was?
23 A It was Senator Minor, Governor Minor.
24 Q Governor?
25 He is the individual who received the letter
03130
1 from the Federal Trade Commission we looked at
2 yesterday?
3 A That's correct, same guy.

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Q Next page, please.
This is Mr. Fortis talking, he says this industry is highly competitive in advertising. What we have is the only thing we could do. It all depends on the administrator.
Next page.
Mr. Fortis again, of course, they use this cigarette advertising code for restrictive trade purposes, then I hope you get them.
Next page.
Mr. Temko, you understand Mr. Temko to be an attorney with the tobacco companies?
A Yes. I think we seen his name in one of the documents this morning.
Q There are no underlying agreements, there is nothing in FTC authority to prevent advertisements to use or other things of this sort in the code. We're not actively supporting legislation, only the desire to require labeling on the package. We do not wish to open ourselves to the question why we have not advocated this before.
Next page.

03131

Mr. Fortis is explaining why the industry hasn't sought legislation. Says, one, I don't want to give this sort of power to a government agency, two, I doubt that it would be desirable to have such legislation in the face of antitrust division opposition. I'm speaking only as a citizen on this point, three, I doubt as a legal matter whether congressional authorization to Maynerd would be upheld, makes a reference to a law case there.
Fortis continuing, I don't really see any antitrust problem of consequence in this code. Of course, if I were in your chair, I would keep a sharp eye on what these people were doing.
Next page.
And next page down.

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16 Here is a discussion, Mr. Fortis is referring
17 to Governor Minor, says he has a relatively simple
18 job, just that he can't formulate statements or
19 becomes a word game. What you need is broad standards
20 and a tough administrator.
21 All right.
22 Put up Exhibit 423.
23 They also went to the Federal Trade
24 Commission, correct?
25   A That's my understanding, yes.
03132
 1   MR. SCHIFFERMAN: What was the exhibit,
 2 please?
 3   MR. FERGUSON: 423.
 4 Q Memorandum to the Lorillard file regarding
 5 FTC conference on cigarette advertising code, April
 6 27, 1964.
 7   Based on your review of the documents do you
 8 know why the industry representatives visited the FTC
 9 with regard to the cigarette advertising code?
10 A It's the same concern that this could be a
11 violation of -- could be construed as a violation of
12 antitrust law and they wanted to know whether they
13 were going to get in trouble with this. They would
14 like some clearance they would not get in trouble for
15 this.
16 Q Blow up the bottom paragraph on the front
17 page, go to the next page.
18   Bottom paragraph.
19   Chairman Dixon's first comment was who is
20 going to be Kennesaw Mountain Landis.
21   Are you old enough or enough of a baseball
22 fan to know who that is?
23 A Yes, Kennesaw Mountain Landis was the
24 commissioner of baseball, very powerful baseball
25 commissioner in his day. He was the authority that
03133
 1 ruled baseball.
 2   Q Austern, A U S T E R N, stated that no
 3 administrator had yet been chosen but

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that we were
4 seeking a man of unquestioned integrity
and ability.
5 Dixon later made several,
perhaps not totally
6 facetious, comments about his own
availability
7 Throughout most of the meeting Dixon's
preoccupation
8 was with the antitrust implications of
the code,
9 commented that it will be quite a trick
to collect
10 $100,000 for each violation, you know,
baseball is
11 considered a sport, you can't get away
with that with
12 advertising.
13 Go to page three of the
document, please.
14 Looking in the second
paragraph.
15 Dixon pointed to section two of
article 2
16 which he said makes me shiver, he said
what concerned
17 him was subjection of industry
advertising practices
18 to one man control. He said he believed
advertising
19 was an important competitive weapon in
the cigarette
20 industry, perhaps the principle
competitive weapon.
21 He said that as he reads the code, an
advertiser could
22 be barred from making a truthful
nondeceptive
23 representation about his brand by the
arbitrary
24 unreviewable act of the administrator.
25 Based on your review of the
documents, do you
03134
1 have an opinion as to whether the
cigarette
2 advertising code was administered in the
fashion that
3 the industry told the Department of
Justice it would
4 be administered?
5 A Yes, I have an opinion.
6 MR. WEBB: Objection, lack of
foundation.
7 THE COURT: Sustained. The
"yes" in the
8 answer will stand unstricken.
9 BY MR. FERGUSON:
10 Q Could we see Exhibit 5925,
please?
11 Do I understand correctly that
the cigarette
12 advertising code was to be administered

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independently
13 by a man of integrity, Governor Minor,
correct?
14 A That's correct, the intent was
stated that
15 way, yes.
16 Q This document is headed Wald,
Harkraden &
17 Rockefeller.
18   Do you understand them to be
attorneys for
19 Lorillard?
20 A Yes, I do.
21 Q December 8, 1964, confidential
memorandum to
22 file regarding meeting of the legal
committee on
23 December 3, 1964.
24   Identifies Henry Ramm, R. J.
Reynolds; Syril
25 Hetsko, American Tobacco; Frederick
Haas, Liggett;
03135
 1 Paul Smith, Philip Morris, Adamson
Layman, Brown &
 2 Williamson; William Ross, P. Lorillard
Company.
 3 Says during course of the
meeting,
 4 approximately five p.m., a secretary
came in and
 5 notified Mr. Ramm that Governor Minor
was calling,
 6 quote, the five companies, close quote.
 7 And Governor Minor is who?
 8   A Governor Minor was the
administrator of the
 9 voluntary cigarette advertising code.
10   Q He identifies the five
companies as R. J.
11 Reynolds, American Tobacco Company,
Liggett and
12 Myers, Philip Morris and Brown &
Williamson and wished
13 to speak with them. Ramm indicated that
the five
14 companies would speak with him alone.
Ross, however,
15 remained in the room because he
considered it improper
16 for the administrator to address the
five companies as
17 a group without the participation of
Lorillard on a
18 matter directly involving Lorillard.
19 Next page.
20 Haas subsequently left the room
during first
21 part of the conversation with the
administrator over
22 the speaker phone and did not return
until it was
23 concluded.

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Yehman at one point told the administrator that he was leaving the room and he disapproved of the

03136

communication. However, he returned about five minutes later and remained in the room until it was concluded.

Next page.

Go back to the previous page, back to page two.

The administrator down here in this, the administrator stated he had been approached by Lorillard's representatives with a compromise proposal, rather than deleting the word micronite from the package in advertising, that company proposed to delete the word filter on both the front and back and to place on one side of the panel the following statement, made by the micronite process, a name used to describe Kent's method of filter construction.

Based on your review of the documents also, you understand this to be a discussion of the Kent cigarette advertising?

A Yes.

Micronite was the name of Kent -- that was the name that Kent applied, Lorillard applied to the Kent filter and this was a discussion of advertising for Lorillard's Kent cigarette being held by the lawyers for the various companies.

Q Had Governor Minor taken a position regarding

03137

Lorillard's advertising of Kent?

A Apparently he was helping to work out a compromise among the other five companies on what was an appropriate -- in his view an appropriate position for Kent, Lorillard to have to take with regard to Kent.

Q Had Governor Minor told Lorillard that the use of the word filter was a health claim?

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 9 A Apparently so.
10 Q Now to page three.
11   Considerable amount of time was
spent by the
12 various counsel who were in the room in
questioning
13 the administrator in order to understand
precisely
14 what the compromise proposal. When its
terms had been
15 fully grasped, the administrator stated
that he ways
16 strongly inclined to adopt the compromise
if the five
17 companies had no objection to it.
18   Is the behavior that is described
in this
19 exhibit consistent with the explanation
offered to the
20 justice department by the industry as to
how the code
21 would be administered?
22 A No, seems to me this is exactly
the sort of
23 thing that Justice Fortis and Mr. Orrick
and the folks
24 at the FTC were concerned about. They
were concerned
25 that the industry was granting enormous
power to the
03138
 1 administrator to do what he wanted and
they were
 2 concerned that the companies would use the
cigarette
 3 advertising code to reach agreements among
themselves
 4 about how they would advertise, and this
seems to be
 5 an example of exactly that happening that
rather than
 6 making an independent decision about what
was right or
 7 wrong under the code, the administrator
asked the five
 8 companies who -- not Lorillard but the
other five,
 9 well, would this be all right with you?
I'll accept
10 it if this is okay with you.
11 I think we have reached an
agreement as to
12 how Lorillard should advertise the Kent
filter and in
13 fact the agreement was to remove the word
micronite
14 from the advertising.
15   Q Go to page four.
16 The administrator said he couldn't
understand
17 why Lorillard would be willing to give up
the word
18 filter on the back and front of the package

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in
19 exchange for using the word micronite on
the side
20 panel, which the administrator thought
no one would
21 read. He went so far as to state that
he thought
22 Lorillard was crazy to make the proposal
but he was
23 not running the Lorillard company, he
believed the
24 five companies would be able to accept.
25 Yehman returned to the room before
this point
03139
 1 and came up to Ross and said in a heated
and emotional
 2 way that it was highly improper for them to
be holding
 3 this kind of a conversation but he felt in
any case
 4 the companies would be foolish not to
accept the
 5 proposal but that Ross was not to tell
his client
 6 this. He then stalked away.
 7   Based on your training and
review of the
 8 documents in this case, do you have an
understanding
 9 as to why it would be improper for this
conversation
10 to be occurring?
11 A Yes.
12   MR. WEBB: Objection,
speculation.
13   THE COURT: You need to rephrase
the question
14 in terms of the expertise.
15 BY MR. FERGUSON:
16 Q Have you reviewed a document
called the Brown
17 & Williamson antitrust compliance policy?
18 A Yes, I have.
19 Q What is that?
20 A Companies are aware of the
antitrust laws and
21 they have been for sometime and they are
aware that
22 things that they or their employees and
executives
23 might do could be violations of the
antitrust laws and
24 could get the companies in trouble.
25   So they often have stated
policies in which
03140
 1 they train their employees and their
executives, they
 2 say these are things that you shouldn't do
because if
 3 you do, you will get yourself and the
company in

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4 trouble, you will be violating the antitrust laws.
5 Q Did the Brown & Williamson antitrust
6 compliance policies say what a Brown & Williamson
7 employee should do if competitive matters are
8 discussed in his or her presence?
9 A Yes, Brown & Williamson has a policy like --
10 in a document like this and employees are instructed
11 that in situations like this where discussions with
12 the competitors are to take place, you are supposed to
13 leave the room and call your supervisor and tell them
14 what happened, you are supposed to get yourself out of
15 there.
16 Q Is Mr. Yehman a Brown & Williamson employee?
17 A He is a attorney for them, yes.
18 Q Did Mr. Yehman's conduct at this meeting
19 comply with the Brown & Williamson antitrust
20 compliance policy?
21 A Well, with -- no. He was clearly upset about
22 it, at least according to the document but he did in
23 fact stay in the room, took part and stated his
24 position that they -- he thought the companies ought
25 to agree with the proposal.
03141
1 Q Page five, please.
2 The administrator requested that the
3 companies notify him individually prior to 11:30 on
4 Friday, December 4, the following day, as to whether or
5 not they were willing to go along with the Lorillard
6 compromise.
7 Ross left the meeting shortly after the
8 conclusion of this conversation at approximately 6.
9 Subsequently this firm learned through John
10 Russell that the five counsel after Ross's departure
11 had decided that it would be inadvisable for them to
12 develop a common position on the Lorillard proposition
13 and each of them should notify the administrator

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14 individually that they had no objection
to it.
15 Is the behavior described in
this exhibit
16 consistent with competition or
collusion?
17   A This is consistent with a
collusive
18 agreement. This is an example of, as I
said before,
19 firms doing exactly what the justice
department and
20 federal trade commission were concerned
might occur,
21 reaching an agreement among themselves as
to how
22 Lorillard ought to advertise its Kent
filter products.
23 MR. FERGUSON: This is an
appropriate time.
24 THE COURT: Take a break.
25 (At this time a short break was
taken.)
03142
 1   THE COURT: Please sit down.
 2   BY MR. FERGUSON:
 3 Q Dr. Solow, I flipped over the
flip charts
 4 there back to what you wrote out about
collusive
 5 arrangements. We have talked about an
arrangement not
 6 to advertise on the basis of health at
great length, I
 7 guess.
 8   I want to talk now about numbers
3 and 4 up
 9 there, arrangement to refrain from in-
house testing of
10 live animals and an arrangement to share
breakthroughs
11 on safe products.
12   Do you have an understanding as
to why live
13 animal testing is of any consequence in
the cigarette
14 industry?
15 A Yes.
16 Q What is that understanding?
17 A I guess I want to make clear, in-
house
18 testing of live animals, I think I said it
is with
19 regard to smoking and health, but I don't
think I
20 wrote that down. In order to understand
the concept
21 of consumption -- for example, the link
between
22 smoking and cancer, you have to have some
tests to run
23 to see whether smoking causes cancer,
whether the

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24 compounds in the smoke --
25 MR. KACZYNSKI: Your Honor, I object to the
03143
1 witness's qualification on scientific issues.
2 BY MR. FERGUSON:
3 Q Did Dr. Wynder reach the conclusion that
4 cigarettes cause cancer in laboratory animals?
5 A My understanding is that Dr. Wynder took the
6 smokers' cigarettes and condensed it down into a tar
7 like substance and painted it on the shaved skin of
8 the backs of lab mice and observed that when he did
9 that tumors grew and cancerous tumors grew.
10 Q Were the mice alive when the tar was painted
11 on them?
12 A Yes.
13 Q Do you know how Arthur D. Little acted to
14 recommend indicate Dr. Wynder's results?
15 A My understanding is Arthur D. Little Company
16 on behalf of Liggett & Myers did the same thing, to
17 see if it was true, to see if you could repeat the
18 result, you repeat the experiment and get the same
19 results.
20 Q Using live mice?
21 A Yes, that is my understanding.
22 Q Have you examined the documents of the
23 Liggett & Myers company with regard to their
24 development of the XA product?
25 A Yes, I have.
03144
1 Q What type of testing did Liggett & Myers use
2 to determine whether the XA product developed tumors
3 in rodents?
4 A Well, they repeated -- as I said, first they
5 had the Arthur D. Little people repeat Dr. Wynder's
6 experiments. And then when they eventually developed
7 their XA product they used the same test and painted
8 the condensed smoke from that cigarette on the backs
9 of mice to see whether it caused tumors and whether it

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10 caused cancer in that sense.
11 Q Have you reviewed documents describing the
12 development of project XA and the Premier product at
13 R.J. Reynolds?
14 A Yes, I have.
15 Q Did R.J. Reynolds perform testing to
16 determine whether the product caused tumors in
17 rodents?
18 A Yes, they did.
19 Q What testing did they do?
20 A They did the same sort of testing. Let me go
21 into just a little bit to complete the first answer
22 with regard to XA.
23   MR. WEBB: I object. There is no question
24 pending.
25   BY MR. FERGUSON:
03145
 1 Q Would you like to supplement your answer
 2 concerning XA?
 3 A Please.
 4 Q Please do.
 5 A Liggett & Myers also did testing with rodents
 6 in which the rats or mice breathed the smoke. And
 7 they would basically put them in a box and pump
 8 cigarette smoke in there for a couple of years and use
 9 that to determine whether -- to determine what the
10 consequences of the smoking were. It is another type
11 of animal test.
12 Q Is that called an inhalation test?
13 A That is my understanding.
14 Q Did you form an understanding in your review
15 of those documents that you have described as to the
16 importance of live animal testing and the development
17 of innovative cigarette products?
18 A Yes.
19 Q What is that understanding?
20 A If you want to know whether you have a safer
21 product, you have to be able to test it to see if it
22 is a safer product. And this is the method that
23 scientists have available to do that, the direct
24 method to see whether it is a safer

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product.
25 Q Exhibit 2532, please. Not for the jury just
03146
1 yet.
2 MR. FERGUSON: Your Honor, I believe we have
3 reached an agreement with counsel for the defendants
4 on this. We now have a redacted version of the
5 exhibits. And if everyone has looked at the first
6 page I will ask people to put up the second page.
7 Second page, please. And the State is going to offer
8 only these two pages.
9 THE COURT: Any objection?
10 MR. LEITER: No objection, your Honor.
11 THE COURT: Admitted.
12 (Exhibit 2532 was
13 received in evidence.)
14 BY MR. FERGUSON:
15 Q Bring up the first page, please. It says
16 draft on the top, produced by R.J. -- RTC is stamped
17 on the side of the document. And here it says
18 prepared by A. Rodgman, R-o-d-g-m-a-n, and F. G.
19 Colby, C-o-l-b-y, March 1983. Who are those people?
20 A Mr. Rodgman and Mr. Colby are scientists who
21 work for the Reynolds company, the R.J. Reynolds
22 Company.
23 Q Can we see the next page, please? This is a
24 little tough to read because there is something
25 stamped over the top of it.
03147
1 Throughout the domestic industry, two
2 gentlemen's agreements -- gentlemen is in quotes, were
3 operative in the early days. Any company discovering
4 an innovation permitting the fabrication of an
5 essentially safe cigarette would share the discovery
6 with others in the industry. No domestic company
7 would use intact animals in house in biomedical
8 research.

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 9 We know the latter agreement has been broken
10 by at least two domestic companies and suspect the
11 former agreement would not be honored today.
12 Did I read that correctly, Dr. Solow?
13 A I thought you read it correctly.
14 Q Have you seen the term gentlemen's agreements
15 in other documents that you have looked at?
16 A Yes.
17 Q Do you have an understanding of what the word
18 gentlemen means in this context?
19 A My understanding of a gentlemen's agreement,
20 it is an agreement that is not formally written down,
21 it is not a contract, but it is an agreement -- it is
22 an agreement that people understand they are to stick
23 to.
24 Q Are Reynolds employees the only people who
25 have used the terms gentlemen's agreements in the
03148
 1 documents have you looked at?
 2 A No, that is not the case.
 3 Q Other companies have used that as well?
 4 A Yes.
 5 Q Now, the second point up here, no domestic
 6 company would use intact animals in house in
 7 biomedical research, is that the arrangement that you
 8 are describing on the board here when you say
 9 arrangement to refrain from in-house testing of live
10 animals?
11 A Yes. That's part of the support for that
12 opinion.
13 Q Is such an arrangement between competitors to
14 not use live intact animals for testing consistent
15 with competition or with collusion?
16 A I think that would be consistent with a
17 collusive agreement, an agreement between or among
18 rival firms not to do something which firms might well
19 find it in their own self-interest to do.
20 Q The first point, any company discovering an

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21 innovation -- discovering the innovation
permitting
22 the fabrication of an essentially safe
cigarette would
23 share the discovery with the others in the
industry.
24 An arrangement.
25 Is that consistent with
competition or
03149
1 collusion?
2 A I think an arrangement like that
would be
3 antithetical to competition, it would have
tendency to
4 suppress competition.
5 Q Isn't this a good thing, if
somebody finds a
6 better mouse trap, to share it with others?
7 A The problem is that it removes the
incentive
8 to find the better mouse trap. Economists
believe for
9 firms to innovate they need to be able to
capture a
10 return on their efforts, or if you put time
and effort
11 into figuring out a better mouse trap, an
essentially
12 safe cigarette, to use this language, you
would want
13 to be able to sell it to people and tell
them that it
14 was a safer product and make some money off
of your
15 investment.
16 If you tell your rivals what you
have
17 discovered, then they are going to be able
to produce
18 it without having incurred the same sort
of costs
19 that you incurred in figuring out how to
do it in the
20 first place. They will actually have an
advantage
21 over you.
22 So it would remove whatever -- it
would
23 remove the reward or lessen the reward for
doing the
24 work in the first place. If you wanted to
do the
25 right thing, so to speak, it seems to be
equally
03150
1 plausible that you would share the
discovery with the
2 government or the public health community.
But to
3 share it with the others in the industry I
think has
4 the tendency to reduce the incentive to do

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the
 5 innovation in the first place.
 6 Q You spoke yesterday some about the
Tobacco
 7 Industry Research Council, TIRC.
 8 A Yes.
 9 Q And I think you said that Judge
Barns at the
10 Department of Justice had recommended that
the
11 companies give the money to some third
party to do
12 some research. Did the TIRC do something
like that?
13 A TIRC itself did give money, and I
believe the
14 companies did give money to support
research by others
15 as well. When we were discussing that
document, Judge
16 Barns offered this as an alternative to
TIRC. And the
17 firms, what the firms did was to set up
TIRC and also
18 to give money.
19   So they didn't follow the judge's
advice in
20 terms of just not doing TIRC, let's just
give money,
21 they did both, a little bit of both.
22 Q 322, please.
23   Dr. Solow, is pooling research
efforts, such
24 as through TIRC, is that consistent with
competition
25 or consistent with collusion?
03151
 1 A Again, I think it depends on what
you do with
 2 it. I think that firms often engage in
joint
 3 ventures, and they work together to do
research. The
 4 concern is that when you have firms doing
research
 5 together they will also find ways not to
compete on
 6 the products that they discover and so
forth.
 7   So depending on how -- depending
on the
 8 structure of the market and depending on
how firms
 9 behave it could be anti-competitive, it
could be
10 innocuous.
11 Q This is Exhibit 322. It is
headed Research
12 and Development Establishment, British-
American
13 Tobacco Company Limited, Southampton, 24
September
14 1962. 1962 Research Conference,

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Southampton.
15 Have you seen this before?
16 A Yes, I have.
17 Q Does this document discuss the subject of
18 research being done on an industry wide basis as
19 opposed to that done by an individual firm?
20 A Yes, does.
21 Q And does it offer reasons why, from the
22 perspective of BATCo, it was desirable to be done on
23 an industry wide basis?
24 A Yes, it explains why BATCo felt that the
25 arrangement in the United Kingdom, in England to do
03152
1 research on an industry wide basis was preferable to
2 having firms do their independent research.
3 Q Page 2, please. Now, you heard the jurors
4 had some trouble seeing this. Is it the angle of the
5 screen that is the problem or just the size?
6 A JUROR: Size.
7 MR. FERGUSON: Can we make it a little
8 larger?
9 BY MR. FERGUSON:
10 Q I guess what I want is page 6. Right there.
11 Now, is the discussion concerning why from
12 BATCo's standpoint it is desirable to have industry
13 wide research included on this page of the document?
14 A Yes. It is right in the middle there.
15 Q And perhaps rather than me reading it you can
16 read it. Can you come down here and point at the big
17 one or do it from up there?
18 A Sure. No laser?
19 Q Sorry. Low budget operation.
20 A Most high tech place on the planet. It is
21 this section here.
22 It says just a little digression here,
23 B.A.T., as you know, has decided that all its
24 biological research should be done on -- I suppose it
25 should say an industry basis, but it says on industry

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03153
basis. If in fact, this had been the case in this
circumstance then Lorillard could not have come out
with such pronouncements. This is a good reason for
doing medical and biological research industry wide,
and it points out the danger which must be expected
when any single firm goes it alone. So there's the
concern.
Q What Lorillard pronouncements are they
talking about, do you know?
MR. WEBB: Objection. Speculation.
THE COURT: Sustained, without foundation.
BY MR. FERGUSON:
Q Does this document discuss the situation
concerning Lorillard?
A Yes, this document discusses -- this document
is from 1962, I believe, and discusses Lorillard's
Kent filter, the micronite filter which we have talked
about a little bit just a few minutes ago.
Q Let's go back to the first page here. It
says -- this Sir Charles Ellis. Is Sir Charles Ellis
a researcher for British American Tobacco Company?
A Yes, a high up researcher for British
American Tobacco.
Q And had Lorillard with the Kent done any work
with ciliastasis?
03154
A Yes, they had.
Q What is ciliastasis?
A Well, my understanding of it, relying on
things that Dr. Burns explained to you, and high
school science and all of that, the cilia are these
little hair-like things in the lungs that move and
they -- as they move they transport the mucus in the
lungs, they help to clean the lungs. And ciliastasis
is a phenomenon where the cilia stop moving and
therefore lose their ability to help the

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lungs keep
11 clean. That is a layman's' understanding.
12 Q Do you understand from the
documents you have
13 reviewed concerning Lorillard's Kent, and
other
14 documents in the case, how cigarette smoke
affects on
15 how cilia is tested?
16   MR. WEBB: Let me object on the
grounds of
17 lack of qualification.
18   THE COURT: Sustained without
further
19 foundation.
20   BY MR. FERGUSON:
21 Q I guess, Dr. Solow, we can read
through the
22 whole document. Do they test on clams?
23 A That is my understanding,
yes.
24 Q And did Kent - with regard to
its Lorillard
25 products make any claim regarding a
substance called
03155
 1 phenols?
 2 A That is my understanding.
The document
 3 discusses the importance of phenols to
the health
 4 question and their possible elimination
from cigarette
 5 smoke. That's my understanding.
 6 Q Was Lorillard promoting Kent on
the basis
 7 that phenols through the Kent micronite
filter reduced
 8 ciliastasis?
 9 A I certainly think they believed
that.
10 Whether they were explaining that to
customers or not
11 that is not clear to me. But they knew
that the Kent
12 filter removed -- the micronite filter
removed
13 phenols, and they understood the
consequence of that
14 for health.
15 Q Back to page 6, please. Sir
Charles Ellis
16 was not happy that Kent was making these
claims about
17 phenols?
18 A That's right. I think Sir
Charles Ellis was
19 a little upset that somebody had gotten
the jump on
20 the rest of the industry and were able to
make claims
21 that the micronite filter was a safer,
better product.

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22 Lorillard had gone on their own, as he said, and they
23 had gone it alone. And this is what happened. They
24 had a competitive advantage and they took advantage of
25 it. He was upset about that.
03156
1 Q Was Lorillard acting competitively?
2 A I would say in this instance Lorillard was
3 breaking ranks with the arrangements and was taking
4 competitive advantage. As we saw later on in the
5 cigarette advertising code they got reined in.
6 Q Are there reasons why a commercial firm would
7 not want to do its research outside of its own
8 facilities?
9 A There are basically two reasons why firms
10 would want to do their research in house. And those
11 are quality control, being certain that things are
12 done right. It is the old, if you want it done right
13 do it yourself.
14 And secondly, that there is information that
15 is generated, you learn things from research. And
16 some of that may be of commercial value. Some of the
17 things you learn may enable you to produce better
18 products. You want to keep that information to
19 yourself in order to capitalize on it. You want to
20 earn the return on your efforts. If you share that
21 information with other people, you do the work, they
22 get the benefits of your study, and how do you make
23 any money on that? There is good economic analysis, a
24 well understood economic point.
25 Q Exhibit 463, please.
03157
1 Dr. Solow, we have heard about this medical
2 college at the University of Virginia. You are
3 familiar with -- you have read the transcript of the
4 defendants' opening statement?
5 A Yes.

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Q And did you hear some testimony where Dr. Henningfield was asked questions about the medical college at the University of Virginia?
A Yes, I believe I have.
Q And these fellows, Dr. Larson, Dr. Silvette, did American Tobacco fund research at the medical college, the University of Virginia?
A Yes, I believe they did.
Q Did you read documents which suggested that American Tobacco Company did not believe the research being done at the medical college of the University of Virginia was particularly useful to it?
A Yes.
Q This is titled confidential memorandum to Mr. Hetsko regarding the conference with Messrs. Harlan and Harlow on Wednesday, August 25, 1965 at company law library.
Do you understand those individuals to be employees of American Tobacco?
A Yes, I do.

03158

Q Can we go to page 3? Go back to the page just before that, 2. History of American Tobacco Company biological research. Of course, the research department has long had laboratory space and facilities for research in plant biology. In other words, it has, quote, biological, close quote laboratories. Harlan recalls that when he came to the company's laboratory about thirty years ago there were animals there. They were removed shortly thereafter to the laboratories of the Medical College of Virginia, MCV.
Now, let's go to page 7. While MCV research has been under the general direction of Haag and then Larson, neither man has, in recent years, done the research himself. Larson is now so busy that he has little time to devote to anything but the broadest

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17 supervision of experimental work. MCV work is done by
18 graduate students, volunteers, in effect, widely.
19 Do you use graduate students to help with
20 your research?
21 A No, generally not. When I -- I have worked
22 with graduate students on occasion, I will say that.
23 Generally I want to do my own work. I have supervised
24 graduate students in their work. I have on occasion
25 worked with graduate students, but we work together.
03159
1 I don't supervise them, tell them to do the work and
2 then I will put my name on it. I do that myself.
3 Q Why?
4 A Because I want to make sure it is done right.
5 I want to make sure it is correct.
6 Q This, continuing, verifying competence and
7 abilities, who lack, more often than not, any
8 overriding personal interest in maintaining the
9 highest standards, i.e., those the company laboratory
10 would maintain. There is a strong feeling, thus, that
11 experimental work which has had to be farmed out to
12 others lacks the scientific standards the company and
13 the nature of the work demands.
14 Now, this an example of what you were saying
15 why companies would want to keep research work inside?
16 A Yes. It certainly is consistent with that
17 statement. You want to do it right. You want to keep
18 the standards up. You want to make sure that it is
19 done well. And you can do it well if you do -- you
20 can be certain of that -- more certain of that if you
21 do it yourself. But you run the risk that, the author
22 of this document, which I believe is Janet Brown, who
23 is an American Tobacco lawyer, the author of this
24 document felt that things had deteriorated, quality

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25 had deteriorated at the Medical College of
Virginia.
03160
 1 Q Page 10, please.
 2 A Actually, if you go on in the
document there
 3 are examples of things that the author of
the document
 4 feels were poor quality science.
 5 Q There is a reference here to
Liggett's
 6 research being done apparently on chicken
cilia,
 7 instead of clams. Right above that it
says Haag and
 8 Larson -- those are the Medical College
of Virginia
 9 people, right?
10 A Yes.
11 Q -- have long thought well of this
work. And
12 have felt that the company is most
competent to do it
13 properly.
14   So did the University of Virginia
medical
15 college researchers believe that American
Tobacco was
16 competent to conduct biological research?
17 A Yes. In fact the suggestion in
the document
18 is that they felt that the proper place
for the work,
19 the best place for the work was within the
company,
20 that the company was most competent.
21 Q Have you seen any indication in
the documents
22 you have reviewed that American Tobacco
Company ever
23 did in-house biological research?
24 A No. In fact, the documents
suggest that
25 American Tobacco never did its own in-
house biological
03161
 1 research.
 2 Q May I have Exhibit 412, please?
Here it
 3 comes.
 4   Have you seen this document
before, Dr.
 5 Solow?
 6 A Yes, I have.
 7 Q This is Philip Morris research
center. This
 8 looks like a cover to a notebook or
something?
 9 A Apparently, yes.
10 Q Evaluation report, smoking and
health,
11 significance of the report of the surgeon
general's

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12 committee to Philip Morris, Incorporated. Can we turn
13 to the last page of that, please, Dale?
14 This is signed H. Wakeham. Do you know who
15 H. Wakeham is?
16 A Yes, I do. Helmut Wakeham was the head
17 scientist in this area for Philip Morris. He was the
18 chief of the research division for Philip Morris.
19 Q And he says there, individual companies must
20 also do their own research if they expect to develop
21 proprietary positions for the health competition,
22 correct?
23 A That's correct.
24 Q And is Mr. Wakeham correct, that that would
25 be a competitive response?
03162
1 A That would be a competitive -- that would be
2 necessary for a competitive response. In order to do
3 competitive innovation you would have to have a
4 proprietary interest. You would have to own -- you
5 would have to have your own secret, your own
6 information that the rest of the industry didn't have.
7 You would then need to use that to compete.
8 Q In response to the surgeon general's report,
9 do you know whether there was an outbreak of health
10 based competition in the cigarette industry?
11 A I think there was more efforts directed
12 towards tar and nicotine, for example, briefly.
13 Q Let's go back to page 2 of this exhibit,
14 Dale. Down here at the bottom of the page, Mr.
15 Wakeham is talking about the reactions to the surgeon
16 general's smoking and health report. And he says,
17 health impact will surely be an important, perhaps the
18 most important basis for competition in the industry
19 in the next few years. Competitive pressures suggest
20 a breakup of -- next page, please -- the common front
21 approach of the industry through TI and

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TIRC.
22 Have you seen other references to the common
23 front approach?
24 A Yes.
25 Q What is that?
03163
1 A The common front approach is another language
2 for the industry must hang together or we will all
3 hang separately notion, that we have to speak with one
4 voice, and through the TI, Tobacco Institute and
5 Tobacco Industry Research Council, the industry would
6 speak with one voice and question whether there was
7 any link between smoking and health, smoking and
8 cancer and so forth.
9 Q Mr. Wakeham continues, while R.J. Reynolds
10 continues to advocate a joint front, sit tight, status
11 quo approach, it has the most to lose from any
12 change in status quo. Others like American and
13 Liggett & Myers, sanguine for improved competitive
14 positions, show signs of bolting and have capitalized
15 with their new products on early reactions to the
16 report. The greater the long-term market impact of
17 the report, the more intense will there be health
18 competition, which is to say technical competition,
19 among major tobacco companies.
20 Do you have an opinion based on your review
21 of the documents in this case, your economic training
22 and the market positions of these companies, as to why
23 R.J. Reynolds would want to advocate a sit tight,
24 status quo approach?
25 A Yes.
03164
1 Q What is that understanding?
2 A Well, Reynolds being the largest company, the
3 large market share, had a lot to lose. They were
4 selling a lot of cigarettes profitably. And so long
5 as things stay the way they are they will continue to

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make money. Companies that had smaller market shares, American, Liggett & Myers, weren't doing as well. They weren't selling as many cigarettes. And so the opportunity to have a better product and grow in the market would be more and appealing to them. They weren't making as much money and would have been better off if they could find some way to increase their market share. And one way to do that would be to offer safer products.

Q Was Mr. Wakeham advocating in this document that Philip Morris engage in biological research?

A He is making a prediction about what he thinks the future might hold. And he says, if we are going to -- if the future is going to be this way, if the concern that has been raised in the surgeon general's report is going to be a long-term concern, we had better be prepared to deal with that.

We need to think about having a biological effort related to smoking and health, biological research effort related to smoking and health.

03165

Q Take that exhibit down, please.

Now, in 1964 do you know whether Philip Morris or any other company in the industry was engaged in in-house biological research, based on what you have reviewed?

A Some may have been. I don't think that Philip Morris was at the time. Not -- again, you have to keep qualifying, we are talking about biological research related to smoking and health. As the American Tobacco document indicates, biology is a big area. They were doing research on plants, presumably on growing -- programs on growing different strains of

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13 tobacco and so forth. And since plants are biological
14 entities, that would be biological research. But we
15 are talking here about biological research relating to
16 smoking and cancer, smoking and disease, smoking and
17 health.
18 Q Let's go to Exhibit 2356, please.
19 MR. WEBB: What was that?
20 MR. FERGUSON: 2356.
21 MR. WEBB: We don't show that being
22 designated with this witness.
23 MR. FERGUSON: It is on the Court's order
24 admitted. I guess that means it was designated.
25 THE COURT: 2356?
03166
1 MR. FERGUSON: Yes, sir.
2 THE COURT: Perhaps previously, but not for
3 this witness, at least from my copy.
4 MR. WEBB: Nor from mine.
5 MR. FERGUSON: Let me check.
6 THE COURT: If it has previously been
7 admitted, that is another matter.
8 MR. FERGUSON: Let me double-check. Don't
9 put it up on the big board, please.
10 2536 is in the Court's first order.
11 THE COURT: I thought you said 2356.
12 MR. FERGUSON: Did I?
13 MR. KACZYNSKI: What is the correct number?
14 MR. FERGUSON: 2536.
15 MR. McDERMOTT: Certainly woke everybody up.
16 MR. FERGUSON: Just checking. That would
17 explain why Dale couldn't find it either.
18 BY MR. FERGUSON:
19 Q Type at the top says March 12, 1983 draft.
20 It says -- starts out with on March 8th, 1983 I met
21 with Dr. Bob DiMarco at his office in Winston-Salem,
22 North Carolina.
23 Do you understand Mr. DiMarco to be an RJR
24 employee?
25 A Yes.
03167
1 Q Let's go to page 3, Dale. BD, that's Bob
2 DiMarco --
3 A One would assume so.

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Q -- said that there were two things in the conclusion that he wanted to discuss with me. First he said that the conclusion called for more research but not the kind of research that he wanted to do, i.e., research aimed at reducing the risks associated with smoking. I told BD that if by risks of smoking he meant research directed at a safer or less hazardous cigarette, neither the company nor the industry, to my knowledge, has done such research.

This is 1983, correct?

A This is 1983. This is what he said.

Q Is the failure of any company or the failure of RJR in this instance to do research directed at a safer or less hazardous cigarette consistent with competition?

A No. I would imagine that firms, given that there is a demand for consumers for safer products, firms would be actively seeking to find such a product. In fact, we now know Liggett & Myers was doing that sort of research. And that would have been a competitive response.

Q And the failure to do that would be,

03168

conversely, a noncompetitive response?

A Would be consistent with a lack of competition, that's right.

Q Let's look at Exhibit 291. Can we see the next page? There is a title or something.

PM

Incorporated, a tobacco and health R&D approach, presentation to R&D committee by Dr. H. Wakeham, at a meeting held in the New York office on November 15, 1961. Helmut Wakeham, and H. Wakeham is the same fellow you said was doing research at Philip Morris?

A He was the head of the research group at Philip Morris. He was a high level

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scientist at
13 Philip Morris.
14 Q Okay. This doesn't have an
internal page
15 number, but it looks like it is page 20.
16   Dr. Wakeham is saying, to reduce
carcinogens
17 in smoke will require a major research
effort, because
18 carcinogens are found in practically every
class of
19 compounds in smoke.
20   Now, was Dr. Wakeham advocating
that Philip
21 Morris try to develop a safer cigarette?
22 A I think he was certainly thinking
about what
23 it would take in order to do that.
24 Q Go to the next to the last page.
The one
25 just before that. Okay.
03169
 1   And here Dr. Wakeham is
discussing some ways
 2 they might make a cigarette safer,
correct?
 3 A That's correct.
 4 Q Discover major precursors for
carcinogens
 5 and/or cancer promoters. Discover
mechanism or
 6 conditions by which carcinogens are
produced and
 7 modify those conditions. Select
experimental tobaccos
 8 which produce a minimum of carcinogens.
Add anti-
 9 carcinogens. Discover differences in
particulate
10 fractions which will permit separation
of carcinogens
11 in smoke.
12   If Philip Morris was acting
competitively and
13 engaging in biologic research at the
time Dr. Wakeham
14 wrote this memo, do you have an
understanding why he
15 would have to describe these things to
his coworkers?
16   MR. WEBB: I object as to his
lack of
17 expertise in this area to draw that
conclusion, your
18 Honor.
19   THE COURT: Sustained.
20   BY MR. FERGUSON:
21 Q Have you seen anything that
suggests that
22 Philip Morris was doing research into a
safer
23 cigarette product in 1961?
24 A No, not particularly.

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25 Q Would you bring up Washington demonstrative
03170
 1 325, but not for the jury.
 2   MR. McCORMICK: Your Honor, again, we can't
 3 hear the exhibit.
 4   MR. FERGUSON: 325. Washington demonstrative
 5 325.
 6   BY MR. FERGUSON:
 7 Q Have you seen demonstrative Exhibit 325
 8 before, Dr. Solow?
 9 A Yes, I have.
10 Q And what is it?
11 A It is a table that shows data on research and
12 development expenditures, advertising, marketing and
13 promoting expenditures, youth prevention expenditures
14 --, which I presume means youth prevention of smoking,
15 not the prevention of youths -- and then total sales
16 for the six major companies over the period from 1954
17 to 1994.
18 Q Who prepared this chart?
19 A This chart was prepared by the late Professor
20 Adams and a colleague, Professor Brock. It comes from
21 a book that they published.
22 Q And have you spoken with Dr. Brock
23 specifically about the preparation of this chart?
24 A Yes, I have.
25 Q What did he tell you about that --
03171
 1 A He told me --
 2   MR. WEBB: Judge, I will object to the
 3 hearsay between him and Dr. Brock.
 4   BY MR. FERGUSON:
 5 Q Do you have an understanding whether this
 6 document is reliable, and the information that it
 7 purports to report?
 8 A I think that the overall picture that it
 9 presents is reliable.
10 Q Is this derived, to the best of your
11 knowledge, from information that is commonly relied
12 upon by people in your field?
13 A It would be the sort of information that

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14 would be relied upon by economists, yes.
15 Q And would it be helpful for to you illustrate
16 your testimony before this jury?
17 A Yes.
18 MR. FERGUSON: Your Honor, the State offers
19 Washington demonstrative Exhibit 325.
20 MR. WEBB: Your Honor, our original objection
21 -- our objection was that where Dr. Adams and Dr.
22 Brock got this information from is not clear. I don't
23 think that problem has been solved by this testimony.
24 This witness has no personal knowledge of that and we
25 would continue to object to this exhibit because of
03172
1 lack of foundation.
2 THE COURT: I think you do need more
3 foundation about his own reliance and the basis of
4 that reliance on the document.
5 BY MR. FERGUSON:
6 Q Where did Dr. Brock and Dr. Adams get the
7 information that is used in this exhibit?
8 MR. WEBB: Objection. Lack of personal
9 knowledge, unless there is a foundation --
10 MR. SCHIFFERMAN: Also calls for hearsay.
11 MR. FERGUSON: Rule 703 permits an expert to
12 rely on matters that are not necessarily admitted.
13 THE COURT: You haven't gotten to the point
14 of reliance yet, though. His own reliance and the
15 reasonableness of that reliance.
16 MR. FERGUSON: I thought I had, your Honor.
17 I'm sorry. I will go over that again.
18 BY MR. FERGUSON:
19 Q Is this information of a sort that is
20 reasonably relied upon by people in your field?
21 A Yes, data like this would be a common thing
22 to look at.
23 Q And have you relied on this data in forming
24 your opinions in this case?
25 A Yes, I think this data helps me to understand
03173
1 what is going on in the industry.

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Q And do you have any reason to doubt the reliability or accuracy of the information displayed on this exhibit?
A No, not particularly.
Q Do you know what the underlying source of these figures is?
A Yes, I do.
Q And what is the source?
A The underlying data comes from testimony in the Minnesota tobacco legislation, particularly the testimony of a man named Much. His name was Paul Much.
Q What is Paul Much's field, do you know?
A I'm not sure I know.
Q Do you know from where he derived these figures?
MR. WEBB: Judge, I object.
MR. FERGUSON: I just asked if he knew.
THE COURT: Overruled.
THE WITNESS: I am not certain. I believe I know where he derived these figures, yes.
MR. FERGUSON: Your Honor, we offer the exhibit again.
MR. WEBB: Judge, we maintain the objection

03174

that we don't know where the source of the information actually originally came from.
THE COURT: Refused.
MR. FERGUSON: What was Mr. Much's --
MR. WEBB: Judge, I object, unless he has some personal knowledge about where Dr. Much received the information.
MR. KACZYNSKI: What we have is Dr. Solow --
THE COURT: I am sustaining the objection.
BY MR. FERGUSON:
Q Did Dr. Much explain in his testimony in the Minnesota trial his source of this information?
A That is my understanding, yes.
Q And what in his sworn testimony in the Minnesota trial was his explanation of the source of the information?

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MR. WEBB: Objection. Hearsay.
THE COURT: Sustained.
BY MR. FERGUSON:
Q You can take that exhibit down.
Have you examined in any fashion the expenditures by the cigarette manufacturers in the United States for research and development?
A I have seen documents relating to particular projects and the like, yes.

03175

Q And have you been provided with expert reports and information from other experts in this case concerning the amounts of monies spent on research and development in industries other than the cigarette industry?
A Could you repeat that one for me, please?
Q Sure. Have you received information in this case from other experts with regard to the amounts spent on research and development in industries other than the cigarette industry?
A Yes. And I have also seen independent textbook type material on that as well.
Q And do you have knowledge of how much the cigarette industry in the United States has spent on research and development over the last forty years or forty-five years as compared with the amounts spent on research and development by other American industries?
MR. WEBB: Objection. Lack of foundation as to his knowledge about cigarette expenditures. There has been no foundation laid as to that at this point.
THE COURT: Foundation.
BY MR. FERGUSON:
Q Have you reviewed texts with regard to the amount of research and development expenditures by

03176

cigarette companies?
A Not texts, no. That is more the other companies.

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Q What have you reviewed with regard to
cigarette industry expenditures on research and
development?
A I have seen documents coming out of projects
that were involved with listing the amount of
expenditures. For example, I had seen the annual
expenditures for project XA and so forth.
Q Have you reviewed the testimony of Keith
Leffler?
A No, I don't believe I have.
Q Has his testimony been described to you?
A Yes, it has.
Q Let me ask you to assume that Dr. Leffler
described the cigarette industry expenditures --
Strike that. Drop it.
What did Dr. Leffler calculate the average
R&D expenditures of the cigarette companies to be?
MR. WEBB: Objection. Your Honor, as far as
I know, I have received nothing in the way of reliance
materials that this witness has relied upon Dr.
Leffler for any information he is going to testify
about here today.
03177
Second of all, it would be hearsay.
THE COURT: Sustained.
MR. FERGUSON: Your Honor, maybe we can let
the jury go a little bit early and we will sort this
out.
THE COURT: That is just fine. We will see
you at 1:30.
(Jury not present.)
MR. FERGUSON: I guess I am handicapped, your
Honor, not having at my fingertips the rules for
Superior Court for the State of Illinois. But in
Washington an expert witness can rely on matters which
are not necessarily admissible in evidence, including
the opinions of other experts, including the testimony
of other people in trial.

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16 Dr. Leffler is an expert for the State in
17 this case. He has testified at depositions. He will
18 testify in trial. Dr. Leffler's material was known to
19 these defendants, it was designated as part of Dr.
20 Solow's reliance materials a long time ago.
21 I am simply asking Dr. Solow how much money
22 the cigarette industry spent on R&D compared to what
23 other industries spent.
24 Now, if I need to put it in the form of a
25 hypothetical we can do that.
03178
 1 MR. WEBB: Your Honor, actually -- I am not
 2 going to dispute counsel. I don't remember -- just so
 3 I understand, are you saying Dr. Leffler's deposition
 4 was designated to us as reliance material for him?
 5 MR. FERGUSON: I don't know in terms of when
 6 you got the list of exhibits for trial, if it was in
 7 that. I don't know that. Certainly before his
 8 deposition, it was.
 9 MR. WEBB: I am not aware of this witness --
10 that we have been put on notice that this witness was
11 going to be relied upon, Dr. Leffler's opinion, to
12 reach into the witness we have in this case.
13 And, second of all, they are trying to get
14 into evidence through him essentially the testimony of
15 Dr. Leffler when we don't have an opportunity to
16 cross-examine Dr. Leffler. And that is the basis for
17 my objection. Is there a representation being made
18 that Dr. Leffler is definitely going to be a witness
19 in this case?
20 MR. FERGUSON: Sure. If it will solve the
21 problem I will pose it as a hypothetical.
22 THE COURT: That makes it a lot easier.
23 MR. FERGUSON: Why don't we readdress this
24 after lunch, after we have had time to think about it.

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25 THE COURT: Although it is probably not
03179
1 dispositive, you have got differing recollections
2 apparently of whether this was designated as reliance
3 material or at least an inability at this point to
4 verify.
5 I think it would be helpful for you to have
6 an opportunity to look at it over lunch, and we will
7 talk about it, if necessary, before the jury comes
8 out. If you can agree amongst yourselves on a formula
9 for dealing with this line, I won't need to come out.
10 MR. WEBB: That's fine.
11 MR. FERGUSON: We will try.
12 (Luncheon recess.)
03180
1 (Afternoon session.)
2 MR. FERGUSON: Your Honor, we have a couple
3 of suggestions with regard to this imbroglio we got
4 involved in over the R&D chart. And I don't think we
5 have reached agreement, but I thought I would describe
6 those to the Court.
7 I have also raised with counsel for Reynolds
8 the issue of Exhibit 891, which has been refused on a
9 couple of occasions. Your Honor's rulings on some
10 foundational questions has led me to believe that I
11 might be able to establish sufficient foundation for
12 this document with a witness. But I am wondering if
13 we should do it as an offer of proof rather than do it
14 in front of the jury.
15 So let me turn first to the question of the
16 R&D expenses and in the demonstrative exhibit.
17 THE COURT: Let me say on 891 that the
18 Court's ruling may or may not depend on exactly what
19 use may be made.
20 MR. FERGUSON: Understood.
21 THE COURT: Going through the entire document
22 might be offensive, but focusing on some particular

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23 part or parts might not.
24 MR. FERGUSON: I appreciate that, your Honor.
25 With regard to the demonstrative exhibit,
03181
 1 your Honor, that exhibit is a copy of a page out of a
 2 treatise entitled The Tobacco Wars, written by Walter
 3 Adams, the State's deceased antitrust expert, and
 4 James W. Brock, an economist at the University of
 5 Miami who is a consulting economist for the State of
 6 Washington.
 7   The chart itself was in preparation while Dr.
 8 Adams was an expert for the State. And Dr. Adams
 9 asked me to get the underlying information so that he
10 could make these evaluations. Mr. Much in Minnesota
11 had prepared his calculations from 10-K filings, from
12 annual reports of the companies and from their
13 responses to interrogatories. Those interrogatories
14 were classified by the defendants as highly
15 confidential under the Minnesota protective order. So
16 even though I saw them, I was unable to share them
17 with Dr. Adams.
18   As a result, in Washington we sent separate
19 interrogatories on the same points to the defendants.
20 And for lack of a better term, we were stiffed. We
21 didn't get responses to those that made any sense. So
22 the only source Dr. Adams had of this information was
23 the testimony of Mr. Much in Minnesota. I would
24 submit to your Honor that based on Rule 803(a)10, the
25 learned treatise provision, that the witness can at
03182
 1 least read from this chart, the chart doesn't have to
 2 be received in evidence, and that any objection or
 3 question with regard to the underlying reliability
 4 would be addressed on the cross-examination.

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5 Secondly, Mr. Much's testimony, relied on by
6 Dr. Solow, is subject to a hearsay exception. It is
7 prior testimony by an unavailable witness, at which
8 these parties, the defendants in this case, were
9 present and had a full opportunity to cross-examine
10 Mr. Much with regard to the reliability of that
11 information.
12 We got into an interesting --
13 THE COURT: I don't want to lose this. Is
14 this a published document?
15 MR. FERGUSON: The book or the deposition?
16 THE COURT: The deposition. I'm sorry. I
17 misspoke, the book.
18 MR. FERGUSON: The book, yes, it is. Tobacco
19 Wars, Walter Adams and James W. Brock, Southwest
20 College Publishing. The Court can take a look at it.
21 Your Honor, the book was -- as a result of
22 Dr. Adams' untimely death the parties agreed to a
23 period of time during which additional antitrust
24 reliance documents could be denominated by either
25 side. And the State added to its antitrust reliance
03183
1 documents that it provided to Dr. Solow. The book
2 that you are looking at was included in those reliance
3 materials.
4 As a result of the provision of the reliance
5 materials, Dr. Solow was made available last weekend
6 for a continued deposition by defendants, which did
7 occur. And so the book was in fact designated as
8 reliance material for Dr. Solow. The only part of it
9 that was premarked as an exhibit for his testimony is
10 the chart that is at issue.
11 THE COURT: Anything more?
12 MR. FERGUSON: Well, I'm not certain at this
13 point what counsel's approach to this thing is. I
14 would like to examine this witness on the

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contents of
15 that table. I believe he has testified
that he
16 considers that reliable, that people in
his field
17 typically rely on it. I think, if
asked, he would
18 express the opinion that Dr. Walter Adams
was probably
19 the preeminent industry economist in the
United States
20 who studied extensively the tobacco
industry, and
21 published widely, and is relied on by
economists very
22 frequently, and commonly regarding the
tobacco
23 industry.
24 Moreover, I think the objection to
Dr. Adams'
25 underlying data here is really no different
than an
03184
 1 objection to the Bureau of Labor Statistics'
pamphlet.
 2 There may be some question about the way the
Bureau of
 3 Labor Statistics collects its information.
That is
 4 properly raised on cross-examination. It
doesn't rule
 5 out the admissibility of the study itself or
its use
 6 as reliance material by a witness.
 7   MR. WEBB: Your Honor, I actually -
- I guess
 8 this -- this issue started because the
witness
 9 originally was going to rely upon the
deposition of
10 Mr. Leffler, Dr. Leffler. And then
apparently the
11 witness has never seen Dr. Leffler's
deposition. So I
12 told counsel over the lunch hour, if he
wants to do it
13 in the form of a hypothetical, referring to
Leffler's
14 -- you see, Leffler is a witness that we get
to
15 cross-examine some day. Leffler is somebody
clearly
16 qualified on this subject matter.
17   Just so you know, I am not trying
to be
18 difficult, the issue here, Judge, is that if
they are
19 allowed to get this in through this witness
kind of
20 with just a tiny bit of knowledge on this
witness's
21 part and qualified to testify on this
subject matter,

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22 then we in effect are being denied our
right to
23 cross-examine on this very important topic,
which is
24 why if they do in the form of a
hypothetical,
25 referring to Dr. -- Mr. Leffler's
deposition in which
03185
 1 he did talk about these numbers and these
charts and
 2 this subject matter, then I know that
Leffler is going
 3 to be a witness, I will get a full blown
cross at some
 4 point on this subject matter.
 5 And to the extent this information
adds
 6 something to an opinion that Dr. Solow
wants to tell
 7 us about, I think that would be proper and
I don't
 8 think -- I would not object to that. But I
do object
 9 to it being done this way, because Dr.
Adams -- your
10 Honor, this book hardly qualifies as a
learned
11 treatise.
12 First of all, you have already
refused to
13 admit this into evidence, and now it is
being offered,
14 I guess, as a learned treatise, not for an
exhibit to
15 go to the jury. But under the rule, to
publish the
16 chart to the jury in this book. This
book, Judge, is
17 not some published treatise by an
economist. This is
18 a mock -- basically a mock debate based on
evidence
19 presented in Minnesota. This is set up so
there is a
20 hypothetical anti-tobacco person and a
hypothetical
21 pro-tobacco person essentially engaging in
a debate
22 back and forth with each other. This is
not a book
23 that represents economic theory or
research that would
24 ever qualify as learned treatise under
the rule.
25 And so to be able to offer this
as a learned
03186
 1 treatise does not properly qualify, in
my judgment,
 2 and therefore should not be able to be
used on that
 3 basis.

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MR. FERGUSON: May I respond?
THE COURT: Yes. But let me separate the strands, at least what I see as two separate strands. One is the admissibility and display of this exhibit, which is apparently page 112 and 113 of The Tobacco Wars.
And the other is the scope of this witness's testimony on associated subjects. We dealt with both, at least to some extent, before lunch. I want to make sure as I am hearing from both of you that I understand what your position is on each of those subjects.
Is it the defendants' view that this chart should not at this time be displayed to the jury?
MR. WEBB: Yes.
THE COURT: And that is for the reasons you have just stated?
MR. WEBB: That's correct.
THE COURT: Now, do you have any scope comments, just so we are not having to deal with much in front of the jury on this issue?
MR. WEBB: What's not clear to me is -- if
03187
this were to be admitted into evidence, it is not clear to me exactly what use this witness is going to make of it. I am going to speculate now, and maybe Mr. Ferguson can tell me, the witness is going to then say based on what he sees to be the expenditures by the tobacco companies on research and development compared to their advertising expenditures, that based on his comparison of that to other industries he finds our effort or expenditures to be inadequate.
And -- if I have it right, then if the chart itself were to come into evidence -- I have to wait and listen to the foundation -- but I am assuming their next step is to try to qualify him

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as someone
14 familiar with other industries and what
they expend.
15 And I don't know what that foundation is
going to be
16 at this point.
17 So that's why I don't know -- I
can't -- the
18 second question you are posing to me is, am
I going to
19 be objecting at that point. I don't know,
because I'm
20 not sure what the foundation is as to his
knowledge
21 about other industry expenditures and
whether he has
22 an expertise in that field.
23 THE COURT: Mr. Ferguson?
24 MR. FERGUSON: First of all, your
Honor, when
25 I am calling this a learned treatise, I am
not asking
03188
 1 for the chart to be admitted in front of
the jury.
 2 The learned treatise rule is 803(a)18, and
within the
 3 text of the rule it doesn't refer to a
learned
 4 treatise. It says, to the extent relied
upon by an
 5 expert in direct examination, statements
contained and
 6 published, treatises, periodicals or
pamphlets on a
 7 subject of history, medicine or other
science or art
 8 established as a reliable authority by
the testimony
 9 or admission of the witness or by other
expert
10 testimony or by judicial notice. If
admitted, the
11 statements may be read into evidence but
may not be
12 received as exhibits.
13 I am now suggesting, your Honor,
that the
14 table in the book, which was marked -- I
think it was
15 325, should be permitted -- the witness
should be
16 permitted to read that to indicate the
percentage that
17 was spent on research and development,
percentage of
18 total sales by each of these companies.
19 I am being coached here, your
Honor.
20 MR. LUVERA: I don't want you to
say that the
21 exhibit cannot be shown to the jury. It
can. The

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22 only limitation is, it doesn't go to the
jury. It is
23 one of those --
24 THE COURT: I understand.
25 MR. FERGUSON: I thought that's
what I said.
03189
 1 I may have misspoke, but that's what I
intended to
 2 say.
 3 THE COURT: I need to ask a
question here.
 4 Go ahead, Mr. Ferguson, if you
had something
 5 more to say. Actually, I won't be
mysterious. I was
 6 checking -- I thought there was an issue
as to a
 7 publication that may or may not have been
significant
 8 to my previous decision. And I gather
that having
 9 been presented with a book that looks an
awful lot
10 like a published book, that it has now been
published.
11 MR. FERGUSON: Yes, it is. I think
what may
12 have been provided earlier in the Court's
set was a
13 galley set. But this is the published
copy.
14 To satisfy counsel's curiosity,
Mr. Solow is
15 going to be asked what the expenditures on
research
16 and development as a percentage of total
sales are for
17 the cigarette manufacturers. He is then
going to be
18 asked what those expenditures are for a
comparable
19 industry. And that's what I have in
mind here. He
20 has already identified his source for
the comparable
21 industry, that is Scherer and Ross's
text.
22 MR. WEBB: Your Honor, if we
look at the
23 chart that he wants to publish in some
fashion to the
24 jury, on page 112 and 113, this chart,
according to
25 the chart itself is actually -- not
actually based on
03190
 1 the testimony of Mr. Much in Minnesota,
it is
 2 calculated in some way. And somehow Dr.
Adams made
 3 some type of calculation or
extrapolation from

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4 testimony of Paul Much on March 23rd, 1998 in
5 Minnesota. So we have that -- where Dr. Solow is
6 going to be relying on Dr. Adams, who made some kind
7 of calculation or extrapolation from testimony given
8 by Mr. Much in Minnesota, which we don't have here.
9 And therefore, how we -- as far as the issue of
10 whether this is a learned treatise that in any way
11 could be considered reliable, I would respectfully
12 suggest that it cannot be.
13 MR. FERGUSON: Were that the case, your
14 Honor, it is common for experts to rely on work of
15 other experts, whether admissible or not. The rules
16 contemplate, and it is part of the everyday practice
17 of every one of us, in terms of whether this was
18 calculated or not, we have the testimony of Mr. Much,
19 at which Philip Morris was present and had an
20 opportunity to cross-examine.
21 THE COURT: I'm sorry, but --
22 MR. FERGUSON: He just gives the numbers.
23 THE COURT: That's the reason I was giving
24 you the two strands. There is what you have just
25 discussed and there is the display to the jury of this
03191
1 document. I am not saying you haven't made a
2 persuasive argument. Right now you are arguing in
3 favor of this witness being permitted to express an
4 opinion based in part on that data. You are not
5 making a case in your most recent comments for the
6 display of this chart under 803(a)18.
7 MR. FERGUSON: Allow me to do that, your
8 Honor.
9 This data was prepared by Mr. Much's sworn
10 testimony, which we have here, from the 10-K filings,
11 the annual reports of the companies and their own
12 responses to interrogatories in Minnesota.

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The same
13 defendants refused to provide those
interrogatory
14 answers to Washington and refused to
answer
15 Washington's interrogatories regarding the
same
16 subject.
17 The only source, repeat, the only
source of
18 this data was what was provided to Mr.
Much in
19 Minnesota. There is no other source of
the data
20 available. Now, I don't want to fling --
hurl fault
21 at the defendants here, but if there is
better data
22 available we would have made that
calculation. We are
23 using the best we can get.
24 MR. WEBB: My only response, as
far as I can
25 tell by reading the chart -- in fact Dr.
Adams did not
03192
 1 simply take Mr. Much's testimony and
then just put it
 2 into a table. He did some kind of
calculating,
 3 according to this, from the testimony.
The
 4 calculation or the extrapolations or the
assumptions
 5 that he made in doing that, we have no
possible way of
 6 knowing. And that's why this should not
be published
 7 to the jury. It is clearly not
reliable. We have no
 8 basis to know it is reliable, which is
the purpose of
 9 a learned treatise.
10 THE COURT: Is there any
discussion in the
11 book itself of the source of the chart?
12 MR. FERGUSON: You have my only
copy of the
13 book, your Honor.
14 THE COURT: That puts you at a
disadvantage.
15 Let me hand it down and you can see if
there is.
16 MR. FERGUSON: I thought it
indicated that it
17 was taken from the Minnesota testimony
of Paul Much.
18 Minnesota --
19 THE COURT: I am not
questioning you, I just
20 didn't know where to find that.
21 MR. FERGUSON: Calculated from
the testimony

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22 of Paul J. Much at the bottom of the
chart.
23 THE COURT: Is that what we are
all going to
24 find about the chart in there? I'd
better see it back
25 once you are done with it.
03193
 1 MR. FERGUSON: Dr. Adams is
dead,
 2 unfortunately. I have spoken with Mr.
Brock about
 3 this. I suppose if the defendants want
to take his
 4 deposition they can.
 5 THE COURT: Okay. Unless anyone
has any last
 6 thoughts, I am ready to rule.
 7 MR. FERGUSON: No, your Honor.
 8 THE COURT: I will admit the
exhibit under ER
 9 803(a)(18) as a learned treatise. It has
been
10 established by this witness's testimony
that this is a
11 statement contained in a published
treatise,
12 periodical or pamphlet on a subject of
history,
13 medicine or other science or art,
established as a
14 reliable authority by the testimony or
admission of
15 the witness or by other expert testimony or
by
16 judicial notice.
17 I do not believe that the rule
contemplates
18 that the learned treatise exception require
that the
19 document at issue be a treatise within the
narrow
20 scope of the expert's specialty. I believe
that there
21 is contemplation under the rule of broader
22 admissibility. This is consistent, I
believe, with
23 Tegland on Evidence at Section 384.
24 By my admitting this chart to be
used by this
25 witness I am not indicating that it will go
to the
03194
 1 jury. It would be used during the course
of this
 2 witness's testimony or testimony of another
witness
 3 who has a similar need for the chart, but
would not be
 4 expected to go to the jury, though it could
be used in
 5 closing by either party.
 6 As to the scope of the continuing

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testimony
 7 of this expert: If it is along the lines
that Mr.
 8 Ferguson has indicated, and there is an
adequate
 9 foundation for a contrast of these figures
with the
10 figures in other industries, I would permit
such
11 testimony. I think I am going to need,
though, to
12 react to the specific questions and
objections as they
13 arise.
14 Are we --
15 MR. FERGUSON: Thank you, your
Honor. I am
16 unclear whether we can show the
demonstrative exhibit
17 to the jury.
18 THE COURT: Yes, you may. I am
permitting it
19 to be used consistent with ER 803(a)(18).
If
20 admitted, the statements may be read into
evidence but
21 may not be received as exhibits. I believe
that is
22 consistent with the display to the jury
of the chart
23 itself, since simply reading it would
not place it in
24 a form that was usable by the jury.
25 MR. FERGUSON: Thank you. I
understand. If
03195
 1 I might have my book back, your Honor?
 2 THE COURT: Fair enough.
 3 MR. FERGUSON: I think we need
to address
 4 this issue of Exhibit 891, because I
don't want to
 5 sandbag the defendants when I raise
this.
 6 Would you bring that up on the
system,
 7 please?
 8 The Court has ruled several times
now -- has
 9 refused this exhibit several times. It is
authored by
10 D. G. Felten, a BATCo scientist, recounting
a meeting
11 with Helmut Wakeham, a vice-president and
director of
12 research for Philip Morris. It is dated
September 10,
13 1970.
14 Mindful of the Court's earlier
comments, the
15 portion that the State seeks to admit is --
would you
16 bring up the highlighted part there, Dale?

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-- is here
17 on page 2 and 3, starting with Philip
Morris affairs
18 and continuing on page 3, through the
sentence which
19 reads, of Dr. Albert Neilson who had been
in charge of
20 biology.
21 The State's position --
22 THE COURT: Can I just understand,
is this
23 the entire portion of this document that
the State
24 would seek to present and the witness
would seek to
25 comment on?
03196
 1 MR. FERGUSON: Yes, sir.
 2 THE COURT: Okay. Go ahead.
 3 MR. FERGUSON: The State's
position on
 4 this -- first of all, your Honor, this is
an ancient
 5 document, self-authenticating and
admissible on that
 6 basis.
 7 Secondly, we could explore with
this witness,
 8 but I don't think we need to, that the
comments made
 9 in here are contrary to the self-interest,
first of
10 Mr. Wakeham, secondly to the self-interest
of Philip
11 Morris. Because of the apparent
involvement of BATCo,
12 the employer of Mr. Felten, and a
conspiracy with
13 Philip Morris, a statement such as this
would also be
14 contrary to the personal interest of Mr.
Felten and
15 BATCo as a statement against a co-
conspirator, it
16 would be admissible against all other co-
conspirators,
17 which in this case would include Reynolds.
18 And the witness is familiar with
who Dr.
19 Wakeham is, who Dr. Felten is. He is
familiar with
20 the description going on in this portion of
the
21 document and what the economic significance
of that
22 is.
23 MR. KACZYNSKI: May I respond,
your Honor?
24 THE COURT: Yes.
25 MR. KACZYNSKI: Your Honor, it
seems to me we
03197
 1 have two issues here. The first one is

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hearsay and
 2 the second one is whether Dr. Solow can do
anything to
 3 remedy the hearsay.
 4 First of all, we objected the very
first time
 5 it was offered based upon the fact that
there is not
 6 one, not two, not three, but at least four
levels of
 7 hearsay within the document. Your Honor
sustained our
 8 objection and it has been refused -- I
think they have
 9 moved for reconsideration twice out of the
three
10 times. So that's the hearsay issue.
11 Then we say, is there anything Dr.
Solow can
12 do to remedy the hearsay issue? Is there
any way he
13 can lay a foundation? We would contend he
cannot.
14 Dr. Solow wasn't there. He didn't take
part in the
15 conversation. He has no firsthand
knowledge. That's
16 issue number one.
17 And issue number two, as an
expert, is there
18 anything he can do? And rule 703 does not
save him.
19 If Dr. Solow wants to testify that there
was a
20 gentlemen's agreement not to do in-house
biological
21 research and Reynolds was a part of it, and
stops
22 there, then we have no problem with that.
But if he
23 further then seeks to essentially recite
the facts of
24 a document that is otherwise inadmissible,
rule 703
25 doesn't help him. Rule 703 says he may
base his
03198
 1 opinion upon inadmissible material, and
that would be
 2 what he does if he says there was an
agreement and
 3 Reynolds was a part of it. But to take the
then
 4 further step and say, by the way, here are
my opinions
 5 on what the facts were, the facts contained
in an
 6 inadmissible document, we would contend he
is not able
 7 to do that because he does not have
personal
 8 knowledge.
 9   MR. FERGUSON: The second part of

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rule 703 is
10 always a bit of a mystery in antitrust
cases, your
11 Honor, because it says if a type
reasonably relied
12 upon by experts in the particular field
in forming
13 opinions or inferences upon the subject,
the facts or
14 data need not be admissible in evidence. I
think 703
15 does say -- in the business of being an
antitrust
16 economist often what you are dealing with
are pieces
17 of documents and pieces of hearsay here and
there from
18 which the expert has to form an opinion.
19   My concern in bringing this before
the Court
20 was because I was discerning from some
earlier
21 foundation rules that it might be that the
Court would
22 permit Dr. Solow to testify that there was
an
23 agreement to not conduct in-house
biological research.
24 And when Philip Morris found out that
Reynolds was
25 doing it, the president of Philip Morris
called up the
03199
 1 president of Reynolds and told him to
knock it off.
 2 And the economic significance of
that is, it
 3 is activity to enforce an agreement in
restraint of
 4 competition.
 5 Now, I wanted to give the
defendants the
 6 opportunity to anticipate that, if that was
what I was
 7 going to do. And I thought the best way
was, once
 8 again, offer this exhibit and explain to
the Court
 9 that we think it is admissible as a
statement against
10 interest by co-conspirators, and that we
think that
11 Dr. Solow's testimony is somewhat
inexplicable without
12 this explanation in front of the jury.
13 MR. KACZYNSKI: Your Honor, this
is the exact
14 same situation you were faced with the
testimony of
15 Dr. Huber. You ruled Dr. Huber's testimony
16 inadmissible, or precluded it, and then
took the
17 further step of precluding using some

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witness, in
18 essence, as a document delivery device to
provide the
19 same information to the jury that they
could not
20 otherwise present to the jury.
21 We are in the exact same
situation here.
22 This document has been ruled inadmissible
four times,
23 or five times. I have lost count. To use
Dr. Solow
24 frustrates this Court's ruling by allowing
him to
25 essentially regurgitate what is in the
inadmissible
03200
 1 document. And I don't think 703 meets
that.
 2 THE COURT: You brought it up, you
get the
 3 last word.
 4 MR. FERGUSON: I hate to --
 5 THE COURT: Don't just repeat what
you have
 6 said, but I am offering.
 7 MR. FERGUSON: I won't, your
Honor.
 8 THE COURT: I want to read the
portion that
 9 is at issue.
10 Well, I have looked at that
portion. That is
11 a section of this document that led to the
previous
12 ruling because of multiple layers of
hearsay. I do
13 not believe that the document itself is
admissible,
14 and that's the fundamental reason. The
witness may
15 testify to the agreement, if it is his
opinion that
16 there was such an agreement which it
evidently is, not
17 to conduct in-house biological research,
and that
18 there was action taken to discipline those
who strayed
19 from the bounds of that agreement.
20 The witness may not discuss as a
basis for
21 that opinion this specific document or the
contents of
22 this specific document that were just
outlined by Mr.
23 Ferguson. I base this ruling on, really,
the same
24 foundation that has been used in other
rulings as to
25 admissibility of evidence and on rulings in
limine.
03201

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I also would note that Group Health Co-op of Puget Sound v. The Department of Revenue, 106 Washington 2d, 391, at 399 to 400, notes that evidence is offered, not to prove the truth of the documents underlying an expert's testimony and opinions, but for the nonhearsay purpose of establishing one of the bases of that opinion.

Before allowing disclosure of otherwise inadmissible facts to support the expert's opinion, the Court must determine whether the probative value of the information outweighs its prejudicial or possibly misleading effects. ER 703 is not designed, according to Group Health v. Department of Revenue, with which I agree, to enable a witness to summarize and reiterate inadmissible evidence. The Court, in the Group Health case, cites Nachtshein v. Beech Aircraft, 847 F. 2d 1261, favorably.

Courts in Washington have been generally reluctant to allow the expert to be used as a vehicle for the admission of evidence which would otherwise be inadmissible as hearsay. In Tegland, Section 312, there are a number of citations, but I don't think it will get us any further if I give you those citations.

I have gone on at some length to help you understand where I am drawing the line, whether you

03202

agree with that line drawing or not. Not to say that under no circumstance would an expert be permitted to testify to any of the hearsay underlying his or her opinion, but that in general I would not allow the substance of that hearsay to be admitted into evidence -- hearsay or otherwise inadmissible documents.

Any other issues?

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9 MR. FERGUSON: No. Thank you. I think I
10 understand.
11 I do have one question. Did your Honor make
12 a finding there that the unfair prejudicial value of
13 this document outweighs any probative value? I
14 thought I heard that.
15 THE COURT: In this particular case that is
16 so, yes.
17 MR. FERGUSON: Thank you. I understand the
18 Court's ruling.
19 MR. KACZYNSKI: Thank you, your Honor.
20 THE COURT: Any other business that we
21
absolu
tely need to
deal with
before we
get the jury
22 in?
23 (At this time a short break was taken.)
24 THE COURT: Good afternoon. Please sit down.
25 Sorry
to keep you
waiting. We
are going to
run right
03203
1
throug
h to 4:00.
2 BY MR.
FERGUSON:
3 Q Welcome back, Dr. Solow.
4 A You're welcome.
5 Q Can we display State's demonstrative Exhibit
6 325, please?
7 Have you seen this chart before?
8 A Yes, I have.
9 Q And is this chart taken from the book I have
10 in my hand, The Tobacco Wars by Walter Adams and James
11 Brock?
12 A Yes, it is.
13 Q And have you reviewed that as part of your
14 study of the tobacco industry?
15 A Yes.
16 Q What does this chart demonstrate?
17 A This chart lists for the six major tobacco
18 companies the total dollar value of their sales. It
19 is the amount of money they take in from selling

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20 products, their research and development
expenditures,
21 the amount of money they spend on research
and
22 development broadly. Their advertising,
marketing and
23 promotion expenditures. And then the
expenditures
24 they made to prevent youths from smoking --
that is my
25 understanding what youth prevention
expenditures
03204
 1 means -- for the period from 1954 to 1949.
 2 Q It says thousands of dollars.
Does that mean
 3 we should add three zeros?
 4 A You would add three zeros to each
of those.
 5 Q How does this chart form your
opinion with
 6 regard to whether these defendants were
acting in a
 7 manner consistent with collusion or
competition?
 8 A Well, there are two things, it
seems to me,
 9 one learns from this chart. One is you
can see while
10 the industry does spend a fair amount
money in
11 absolute terms on research and development,
you should
12 recognize that that is the total research
and
13 development expenditures. That is not, as
I
14 understand it, simply the health and
smoking research
15 and development, but all research and
development.
16   While these are big numbers --
let's start
17 with Philip Morris, who spent 1.2 billion
dollars over
18 this forty-year period on research and
development,
19 this is a company that had sales of 141
billion
20 dollars over this period. So 1.2 billion
dollars on
21 research and development, it would be a lot
of money
22 to me. This is a company that has revenues
on the
23 order of hundreds of billions of
dollars. And so
24 compared -- that gives you a point
of reference with
25 which to compare the rate of
expenditure.
03205
 1   It also makes it clear that

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while this
 2 industry does a certain amount of
research and
 3 development spending, it does quite a lot
more in
 4 terms of marketing and promotion. This is
one of the
 5 most marketing intensive industries,
advertising
 6 intensive industries there is. Not
necessarily the
 7 highest, but one of them. And they spend
an awful lot
 8 of money -- we could stick with Philip
Morris to
 9 start, again, 18.4 roughly billion dollars
on
10 marketing and promotion during this point
in time.
11 Q Approximately what percentage
calculated
12 against total sales did Philip Morris
spend on
13 research and development?
14 A Well, Dr. Adams actually gives a
number. I
15 will try to do the math quickly in my
head. But it
16 looks like it is about one percent. If
you take 141
17 billion dollars of total sales, one
percent of that
18 would be 1.41 billion dollars. And the
research and
19 development expenditures are a little bit
less than
20 that. So .9. That's a pretty good
guess. .9
21 percent. About nine-tenths of one
percent of its
22 total sales effort it devotes to research
and
23 development, of all sorts, not
necessarily smoking and
24 health.
25 Q What percentage of its sales
does the
03206
 1 pharmaceutical industry spend on
research and
 2 development?
 3 A According to Scherer and Ross,
to Mike
 4 Scherer's textbook, a study showed that
in 1977 the
 5 pharmaceutical industry, what he calls
the ethical
 6 drug industry spent about ten percent, a
little bit
 7 more, ten and a half percent was the exact
number, but
 8 about ten percent of its revenues on
research and

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development expenditures.
Q Is it appropriate to compare cigarette companies to the pharmaceutical companies for purposes of research and development expenditures?
A Well, I think that it is a reasonable point of comparison. The pharmaceutical industry is providing substances that people take -- that people consume to affect their physical well being, has effects on their body and -- on their body in different ways. And the tobacco industry is providing a product that dispenses a substance, nicotine, that has effects on people's body in different ways as well.
So it seems it is not an unfair comparison to make, I guess I would say that.
Q It looks like from my math impaired observation here that R.J. Reynolds was spending a

03207

higher percentage on research and development? Do I have that right?
A A modestly higher percentage. Again, if you look at 118 billion dollars total sales, one percent of that would be 1.18 billion dollars. And they spent 1.23 billion dollars. So it is a little bit more than a percent of sales revenue were spent on research and development for all purposes by Reynolds.
It is still small compared to the pharmaceutical industry as a broad category, but it is a little bit bigger than Philip Morris. In fact, I think a little bit bigger than the rest of the firms as well.
Q Okay. Thank you.
Would you take that down, please, and put up Exhibit 680?
MR. SCHIFFERMAN: I'm sorry?
MR. FERGUSON: 680. I don't mean to mumble.
BY MR. FERGUSON:
Q This document is headed Appendix 1 to Mr.

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21 C.H. Goldsmith, November 15, 1968 from H.
Wakeham.
22 Have you seen this document
before, Dr.
23 Solow?
24 A Sure.
25 Q I am going to call your attention
to a
03208
1 portion, I think it is the second page.
2 Could you blow up that highlighted
portion?
3 Is that big enough for everybody
to see?
4 It says, we have reason to believe
that while
5 this proposal to carry out biological
research and
6 testing may seem a radical departure from
previous
7 policy and practice, we are in fact only
advocating
8 that which our competitors are also
doing.
9 My question for you, Dr. Solow
is, have you
10 seen a version of this document where that
sentence is
11 phrased differently?
12 A Several, actually.
13 Q Okay. Let's put up another one.
14 Exhibit 678, please.
15 Okay. This, again, is to Mr. C.H.
Goldsmith,
16 dated November 12, 1968 from H. Wakeham,
subject, need
17 for biological research by Philip Morris
research and
18 development.
19 Before we move on, you have
reviewed this
20 document and the other versions of this
document?
21 A Yes.
22 Q Is Mr. Wakeham asking for
authority for
23 Philip Morris to engage in biological
research?
24 A Yes. He is saying that he
thinks it is
25 important that Philip Morris start to do
biological
03209
1 research of the type that he describes in
the
2 document. It is quite clear, say from the
first line
3 of the second paragraph, what he is
talking about is
4 health in the tobacco, biological
research.
5 Q Do you infer from his request to
be permitted

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6 to do this whether Philip Morris was doing such
7 research at the time?
8 MR. WEBB: Objection. Speculation.
9 THE COURT: Sustained.
10 BY MR. FERGUSON:
11 Q Let's go to the second page of this one,
12 Dale. Perhaps you could enlarge that for us.
13 Is this an earlier version of the previous
14 exhibit?
15 A Yes, it is.
16 Q And here Mr. Wakeham is saying, we have
17 reason to believe that in spite of previous
18 arrangements within the tobacco industry, at least
19 some of the major companies have been increasing
20 biological studies within their own facilities.
21 This seems to suggest, as you used the word
22 on your chart up there, an arrangement with regard to
23 biological testing, is I think the way you phrased it.
24 Have you seen yet another version of this sentence?
25 A Yes.
03210
1 Q Okay. Exhibit 5361, please.
2 This says, need for biological research by
3 Philip Morris research and development.
4 Can we have the second page, please? I guess
5 it is not there. Wherever it is. Here we are.
6 We have reason to believe that in spite of
7 a gentlemen's agreement from the tobacco industry in
8 previous years that at least some of the major
9 companies have been increasing biological studies
10 within their own facilities.
11 Is this the earliest version of this sentence
12 have you seen?
13 A That is the first draft I have seen.
14 Q Now, am I correct when we saw gentlemen's
15 agreement before that, that was in a document from
16 R.J. Reynolds?
17 A That's correct, that was in a document by Mr.

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18 Rodgman and Mr. Colby.
19 Q And this is Philip Morris using the same
20 term?
21 A This is Philip Morris using the same term to
22 refer to at least one of the two things that Rodgman
23 and Colby were referring to, mainly the gentlemen's
24 agreement not to do in-house biological testing on
25 live animals for the purposes of studying smoking and
03211
1 health.
2 Q Now, Mr. Wakeham here says, some of the major
3 companies have been increasing biological studies with
4 their own facilities.
5 Do you know how Mr. Wakeham knew that to be
6 the fact, if it was the fact?
7 A Yes.
8 MR. WEBB: Objection. Speculation. No
9 foundation.
10 THE COURT: Sustained, without further
11 foundation.
12 BY MR. FERGUSON:
13 Q Have you read documents as part of your
14 review in this case explaining how Mr. Wakeham
15 concluded that other companies were doing biological
16 research?
17 A Yes, I have.
18 Q Okay. Could we bring up Exhibit 740,
please.
19 Thank you, Dale.
20 Philip Morris USA, interoffice
21 corresponde nce, Richmond, Virginia, confidential.
Dr.

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22 H. Wakeham,
October 3rd,
1969.
23
Blow it up
one more time.
24
Have you
seen this
document before,
Dr.
25 Solow?
03212
1 A
Yes, I
have.
2 Q
What is it?
3 A This is a report to -- memo to
Dr. Wakeham
4 from Mr. Carpenter, or Dr. Carpenter,
who is one of
5 Dr. Wakeham's assistants.
6 Q And they are Philip Morris?
7 A He is another Philip Morris
scientist and
8 employee. And in this document Dr.
Carpenter explains
9 how he has been given a tour of the
Reynolds
10 biological facility along with a
scientist from
11 American Brands, which was a successor
company to
12 American Tobacco.
13 Q Is it consistent with
competition to give
14 your competitor a tour of your research
facilities?
15 A I think it could be -- it could be
16 anti-competitive, it could be innocuous. I
think,
17 again -- it would depend on what people
were doing as
18 a result of that.
19 Q Okay. That is kind of a neutral.
20 MR. WEBB: Your Honor, I would ask
to strike
21 counsel's comment.
22 THE COURT: Stricken.
23 The jury will disregard, please.
24 BY MR. FERGUSON:
25 Q Are the plans for the RJR facility
attached
03213
1 to this?
2 A I believe there is a sketch --
original
3 sketch, and then it was done out a little
bit more
4 neatly, that shows the floor plan of the
lab where the
5 various facilities were located. There is

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a
 6 discussion of it in the second paragraph,
two
 7 buildings, and what was included in the
different
 8 buildings and so forth.
 9 Q Okay. And this Dr. Neilson person
showed us
10 the area where they are exposing rabbits to
smoke by
11 catheters through the nose and into the
trachea.
12   Do you know whether that is an
inhalation
13 test?
14 A Yes, I believe so. They are
sticking a tube
15 up the nose of a rabbit and then injecting
smoke into
16 the rabbit's lungs by means of that, as far
as I can
17 tell.
18 Q Is that in-house testing of a live
animal?
19 A Biological test of a live animal -
- I would
20 say that was a biological test being done
in a
21 Reynolds facility and relating to smoking,
and I would
22 presume, to health.
23 Q Would you go to page 3 for just a
minute?
24   This is attached to the document
we are
25 looking at. Is this a plan for the R.J.
Reynolds
03214
 1 biological testing facility?
 2 A It certainly appears to be. Yes,
it seems --
 3 you could compare it with that description.
It
 4 explains where the laboratories are, where
the animals
 5 are kept, which tests are being done, the
inhalation
 6 studies, the inhalation smoking machine,
which is a
 7 different type of test I believe.
 8 Q It has offices and laboratories in
the animal
 9 house?
10 A Yes.
11 Q Okay. Exhibit 741, please. This
is dated
12 October 7, 1969 to Ross Millhiser from
Joseph F.
13 Cullman, III.
14   Those are Philip Morris employees?
15 A Yes.
16 Q And Mr. Cullman writes, I have
reviewed

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17 carefully the proposal contained in Dr. Wakeham's
18 memorandum to Clifford Goldsmith, dated October 26,
19 1969 relative to a biological research program.
20 And then he says, I have discussed with you
21 and George Weisman informally my serious reservations
22 about the wisdom of embarking upon this program at
23 this time.
24 Do you have an opinion as to whether Philip
25 Morris engaged in in-house biological testing in 1969?
03215
1 MR. WEBB: Objection. Lack of foundation.
2 THE COURT: Sustained.
3 BY MR. FERGUSON:
4 Q Based on your review of the documents, do you
5 believe this to be Mr. Cullman's response to Mr.
6 Wakeham's request for biological testing?
7 MR. WEBB: Objection. Lack of foundation,
8 speculation.
9 THE COURT: Overruled.
10 THE WITNESS: It certainly seems to. It
11 says, I have reviewed carefully the proposal contained
12 in Dr. Wakeham's memorandum to Clifford Goldsmith.
13 And we just spent a little time looking at various
14 versions of Dr. Wakeham's memorandum to Clifford
15 Goldsmith relating to a biological research program.
16 BY MR. FERGUSON:
17 Q And here Mr. Cullman says, I would be
18 particularly interested in ascertaining specifically
19 what other tobacco companies are doing in this field,
20 as well as what the government is actually doing as
21 contrasted to what they are talking about doing.
22 Is it important in a cartel for cartel
23 members to collect intelligence or information about
24 the activities of other members about the cartel?
25 A It is important if the cartel has an
03216

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1 agreement to do something or not do something to
2 police it. And in order to police it you have -- you
3 need to have some idea of who is doing what they have
4 agreed to do and who has chosen not to.
5 Q You need to ascertain specifically what the
6 other companies are doing?
7 A If they were in agreement, as I believe there
8 was, to refrain from doing in-house biological testing
9 on safety and health, then a company that was sticking
10 to that agreement, or for that matter a company that
11 wasn't, would want to know what the other firms were
12 doing.
13 Q Okay. Exhibit 754, please.
14 This is a confidential memo to Mr. R. D.
15 Carpenter --
16 Can you make that bigger, please, Dale, the
17 whole thing?
18 From L. Weissbecker, December 15, 1969.
19 Subject, R.J. Reynolds biological research program.
20 To Drs. Osdene and Wakeham.
21 Do you understand this to be a Philip Morris
22 document?
23 A Yes.
24 Q Have you seen it before?
25 A Yes, I have. There is a reference to a Dr.
03217
1 Price from R.J. Reynolds and meeting him at the
2 CTR-USA meeting of December 11 and 12, 1969.
3 Q What is CTR-USA?
4 A CTR is the Center for Tobacco Research.
5 Q Perhaps the Council for Tobacco Research?
6 A Sorry. The Council for Tobacco Research,
7 which is the successor organization to the Tobacco
8 Industry Research Committee. It is the new name for
9 the Tobacco Industry Research Committee.
10 Q Does Mr. Weissbecker report that Dr. Price
11 told him that Reynolds caused emphysema in rats?
12 A Yes, they were apparently doing smoke

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13 exposure studies with rats, and the
rats were -- I
14 guess, I don't know quite how long the
rats were
15 smoking to get five hundred cigarettes, but
they were
16 smoking a fair amount, and they got
emphysema,
17 apparently.
18 Q Philip Morris -- do you have an
opinion as to
19 whether Philip Morris was collecting
information on
20 what the other members in the cigarette
cartel were up
21 to?
22 A Certainly these folks, Mr.
Weissbecker
23 discovered something in talking to one of
the
24 scientists from another company, and he
reported it
25 back to his superiors.
03218
 1 Q Have you reviewed information
which allows
 2 you to form an opinion as to whether
members of the
 3 cigarette industry enforced the agreement
to not
 4 engage in in-house testing of live
animals?
 5 A Yes, I believe there is evidence
that the
 6 agreement was in force.
 7 Q Can we see Exhibit 6195, please?
 8   This is dated Tuesday, March 19,
1970, 8:00
 9 to 8:30. Talked to Mr. E. D. Neilson,
by Mr. Vassallo
10 and Dr. Senkus in Dr. Senkus's office.
11   Have you seen this document
before?
12 A Yes, I have.
13 Q Do you understand these
individuals to be
14 employees of R.J. Reynolds?
15 A Yes, I have. Sorry. Yes, I
do understand
16 that.
17 Q This document states at
paragraph 3 that the
18 biological division is being dissolved
in 1970. This
19 is shortly after the previous
documents we looked at.
20   Do you have an opinion as to
whether the
21 dissolution of the biological division
at R.J.
22 Reynolds Tobacco Company was related
to any
23 enforcement of an arrangement to not

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perform in-house
24 testing of live animals?
25 MR. KACZYNSKI: Objection,
your Honor.
03219
1 THE COURT: Sustained.
2 BY MR. FERGUSON:
3 Q Do you have an opinion as to
why this
4 biological facility --
5 MR. KACZYNSKI: Objection,
your Honor.
6 THE COURT: Sustained.
7 BY MR. FERGUSON:
8 Q Let's have Exhibit 439,
please.
9 This is titled Operations
Department
10 Presentation to Philip Morris Board of
Directors,
11 October 28th, 1964, Research and
Development.
12 Have you seen this document
before?
13 A Yes, I have.
14 Q In a cartel arrangement, Dr.
Solow, is it
15 common for members of a cartel to retain
the means to
16 retaliate against someone who violates the
cartel
17 agreement?
18 A As a general matter, yes. In
order -- to
19 enforce the cartel one has to be prepared
to enforce
20 the cartel agreement, one has to be
prepared to punish
21 the -- anyone who chooses to cheat on the
agreement or
22 to respond in the event the agreement
faults apart.
23 Q And speaking hypothetically, we
talked
24 yesterday about price fixing agreements.
One way to
25 enforce a price fixing agreement is for a
firm to
03220
1 maintain a sufficient inventory to respond
to a price
2 decrease, is that correct?
3 A That would be one way, or to have
the
4 capacity to expand production and respond
by expanding
5 outward in the event that somebody chooses
to lower
6 prices below the agreed upon level.
7 Q This is an interesting document
and we will
8 come back to it later.
9 But for now, Dale, I would like to

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look at 6,
10 please.
11 The document reads, in short, the
research
12 and development department is working to
establish a
13 strong technological base with both
defensive and
14 offensive capabilities in the smoking and
health
15 situation. Our philosophy is not to start
a war, but
16 if war comes, we aim to fight and win.
17 A To fight well and to win.
18 Q Thank you. To fight well and to
win.
19 Is what's described in the portion
we just
20 read consistent with competition or with
collusion?
21 A Well, I would say that this is
more
22 consistent with collusion than competition.
In
23 competition we expect firms to start the
wars. We
24 want -- the wars are trying to win in the
marketplace
25 by providing the goods and services that
customers
03221
1 want at low prices. And we like to see
firms engage
2 in those wars, like price wars and product
quality
3 wars, if you would, and not to refrain from
starting
4 them.
5 We recognize in economics that if
firms are
6 agreeing not to compete, that they
nonetheless want to
7 be able to respond in case somebody else
chooses to
8 compete.
9 Q Okay. Indicating that this
company wouldn't
10 be the one to start competing?
11 A That certainly is the philosophy
that is
12 stated there. We are not going to start
the war on
13 smoking and health, but we want to be
prepared in the
14 event that that war starts that we will be
able to
15 take part in it as well and not get
left behind.
16 Q Excuse me just a second.
Exhibit 3801,
17 please. 3801.
18 Have you seen this document
before, Dr.

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19 Solow?
20 A Yes, I have seen that one.
21 Q It says memorandum, RJR, secret, number 12,
22 it looks like EGC, October 26, 1981, Dr. Roy E. Morse.
23 And do you see the language in the third -- paragraph
24 numbered 3 there?
25 A Yes.
03222
 1 Q There is a clear-cut agreement among all U.S.
 2 cigarette manufacturers that any scientific discovery
 3 made within the companies or otherwise sponsored by a
 4 single company which might have a positive impact on
 5 the smoking and health controversy would have to be
 6 freely shared without any cost to the other
 7 manufacturers.
 8   Is that what you were talking about when you
 9 described an arrangement to refrain to share
10 breakthroughs in safer products?
11 A Yes, it is.
12 Q Is that consistent with competition or
13 collusion?
14 A As an agreement, it is consistent with
15 collusion. And, as I said, I think the purpose of the
16 agreement, the effect of the agreement is to remove
17 the incentive to reduce -- to reduce the incentive to
18 find breakthrough products.
19 Q And this document, in fact, says that?
20 A This document, in fact, spells that out quite
21 clear, that this company, that RJR understood that was
22 the effect of such an agreement.
23 Q There would therefore be no incentive for RJR
24 to sponsor the Cohen project. This applies to any
25 other product development or entered research by a
03223
 1 medical institution to be sponsored by a U.S. Tobacco
 2 Company.
 3   Is that the part you are referring to?
 4 A Yes. That is consistent with the theory that
 5 I suggested to you, the economic theory

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that says if
 6 firms want to have ownership in the
rights of things
 7 they discover in order to be able to
make safer -- to
 8 be able to market the products that they
discover,
 9 that they innovate. And that if you
have to share
10 with others, if you agree to share with
others, you
11 remove the incentive, or reduce the
incentive to do
12 the research, because if the research
pays off, you
13 have agreed to share it with other
people, and they
14 will have the benefits of your tests
without the
15 costs, and they will have an advantage
over you as a
16 result of that.
17 Q In your study, did you find any
evidence of
18 any actual sharing of innovative
developments in this
19 industry?
20 A Not specifically, although I
think the
21 discussion by British American Tobacco
about doing
22 research jointly goes in the same
direction. But no,
23 I have not seen an example of a
particular
24 breakthrough product that was shared.
25 Q Assume for me, if you will,
that no
03224
 1 innovative breakthrough was ever shared
among these
 2 companies. Does that make what's
expressed in this
 3 paragraph less collusive and more
competitive?
 4 A No, that doesn't follow -- I
don't think that
 5 follows necessarily at all. The purpose
of the
 6 arrangement is to prevent people from
doing -- from
 7 finding breakthrough products. If it were
very
 8 successful, then you wouldn't have any
breakthrough
 9 products and there wouldn't be anything to
share.
10 Q Are you testifying that nobody
would bother
11 doing it in the first place, so there
would be nothing
12 to share?
13   MR. WEBB: Objection, leading.

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14 THE COURT: Sustained.
15 MR. FERGUSON: I am trying to understand --
16 THE COURT: Sustained.
17 BY MR. FERGUSON:
18 Q All right. I think that is clear enough,
19 then.
20 Exhibit 6165, please.
21 Have you seen this document before, Dr.
22 Solow?
23 A Yes, I have.
24 Q It says confidential to those listed, July
25 28, 1964 from, again, H. Wakeham. And, again, he is a
03225
1 Philip Morris employee?
2 A That's correct. He is the director of
3 research at Philip Morris.
4 Q And on the copy list -- I guess those listed
5 down here at the bottom, George Weissman, Hugh
6 Coleman, do you understand those to be executives at
7 Philip Morris?
8 A That's correct, yes.
9 Q Did you find evidence in your study that
10 agreements existed in Europe, the so-called
11 gentlemen's agreements, with regard to sharing
12 innovation?
13 A Yes. The same -- this document is an example
14 of that.
15 Q And if you can't see it from there -- can you
16 read for the jury what you are talking about, where
17 there is an example of that?
18 A Dr. Wakeham, who is the director of research
19 for Philip Morris, apparently went to Europe and at
20 the time visited with Dr. Carl Weber, who is the
21 director --
22 Q This is why I am having you read it. I can't
23 pronounce this stuff.
24 A I could pronounce it, but I don't think I
25 could translate it. My interpretation is that he is a
03226
1 research director for the German cigarette industry,
2 cigaretten industry is pretty logically

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the cigarette
3 industry. And I think wissenshaftliche is
knowledge.
4 I haven't studied German in the longest
time.
5 In any event, he met with Dr.
Weber, and he
6 was informed -- he reports that he was
informed that
7 the various tobacco monopolies and
tobacco research
8 associations in Europe have a gentlemen's
agreement
9 that they will exchange information
regarding
10 modification to cigarettes which may be
beneficial to
11 human health.
12 He goes on to say he understands
the Swiss
13 have hesitated to join this agreement. So
in other
14 parts of Europe, including Germany, a
similar
15 gentlemen's agreement to exchange
information
16 regarding breakthroughs -
modifications of cigarettes
17 that would benefit health are going
to be shared
18 within the industry.
19 Q Again, the same term,
gentlemen's agreement
20 is used?
21 A Yes, Dr. Wakeham has used
the term
22 gentlemen's agreement a couple of
times here, one in
23 this document, one in the document we
saw previously,
24 and then Rodgman and Colby used the
same term,
25 gentlemen's agreement, to refer to
some of the same --
03227
1 I guess now both of the same -- the
same actual
2 arrangements, the arrangement not to
do in-house
3 biological research, and the arrangement to
share
4 results of breakthrough products regarding
smoking and
5 health.
6 Q Thank you. You can take that one
down.
7 In your study did you discover
whether the
8 individual cigarette manufacturers
developed less
9 hazardous or safer cigarettes?
10 A That is an interesting question,
since my

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11 understanding is that the industry to this day is not
12 willing to say that cigarettes are unsafe in the first
13 place. So whether the industry felt they were safer
14 or not is a little bit of a question.
15 They certainly -- we have talked some about
16 the Liggett & Myers product. That was certainly in
17 their mind safer. The industry has done things that
18 -- has developed products that had less biological
19 activity by their own -- by their own results.
20 Q You have reviewed the studies that report
21 less biological activity for certain products?
22 A Yes. Yes.
23 Q Were some of those products not brought to
24 market?
25 A Some of those products were never marketed,
03228
1 some of those products were marketed.
2 Q What is Ariel? Maybe you can describe it to
3 the jury, A-r-i-e-l?
4 A The Ariel project was a safer cigarette
5 project that was developed by British American Tobacco
6 back in the 1960s. It had -- there were a couple of
7 versions of it, as I understand. But it basically was
8 a cigarette that was designed to heat rather than burn
9 tobacco --
10 Q Excuse me. Can I suggest as you talk about
11 these maybe you can write the names of the products on
12 the chart here?
13 A
Okay.
14 Q
Okay. Ariel?
15 A
Ariel. Ariel
--
16 MR. WEBB: Your Honor, I am going to object
17 to what Ariel was unless there is a foundation laid.
18 I object to lack of foundation to his knowledge.
19 THE COURT: Sustained.
20 BY MR. FERGUSON:

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Q You have reviewed -- have you reviewed documents concerning the Ariel product?
A Yes, I have.
Q Have you reviewed British American Tobacco Company patent documents concerning the Ariel product?

03229

A Yes, I have.
Q Have you reviewed BATCo's biological testing products for the Ariel product?
A Yes, I have.
Q Are you familiar with when the Ariel was in development?
A Roughly speaking, within the general time frame, yes.
Q Do you know when the Ariel product was marketed?
A My understanding is it was not.
Q And your understanding is based on the documents you have reviewed?
A Based on the documents I have seen, yes.
Q When was the Ariel development?
A In the 1960s, the early 1960s.
Q What was the distinguishing feature of the Ariel product?
A The Ariel product heated rather than burned tobacco. It burned tobacco in order to heat an internal element that would generate a nicotine vapor, and the part that was burning was blocked by the filter, so the smoker would inhale the heated vapor that was generated by the burning -- that is -- the heated vapor from the internal element that was heated

03230

by the burning tobacco, but wouldn't inhale the products of the burning tobacco itself.
Q Maybe at the top of the chart we can write safer cigarettes. And you put safer in quotes?
A I put safer in quotes since there are -- as I understand it there are multiple hazards, and I am not really in a position to tell you the extent to which all these hazards were eliminated or

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reduced by each
 9 of these products.
10 Q Can you put the date behind Ariel,
the
11 approximate time?
12 A This was the 1960s, early '60s.
13 Q Did the test results from BATCo
that you look
14 at concerning the Ariel reveal whether the
Ariel
15 reduced biological activity?
16 A Yes, my understanding is that they
did.
17 Q Was the Ariel product marketed?
18 A No. My understanding is it was
never put on
19 the market. It was patented, and British
American
20 Tobacco held the patent for a while and
never did
21 anything with it.
22 Q Do you know what Fact was, F-a-
c-t?
23 A Yes, I do.
24 Q What is Fact?
25 A Fact was a cigarette that had -
- that was
03231
 1 developed to produce lower carbon
monoxide in the
 2 smoke.
 3 Q And when was Fact being
developed? Let me
 4 ask you before that, have you reviewed -
- is that a
 5 Brown & Williamson product?
 6 A That is a Brown & Williamson
product.
 7 Q Have you reviewed Brown &
Williamson
 8 documents regarding the Fact?
 9 A Yes, I have.
10 Q Have you reviewed Brown &
Williamson test
11 results regarding the activity or the
biological
12 activity of the Fact smoke?
13 A Yes, I have.
14 Q Write Fact up there.
15 A (Complying)
16 Q What was the distinguishing
feature of the
17 Fact cigarette?
18 A The design of the Fact
cigarette was a
19 filtration design to reduce carbon di- --
carbon
20 monoxide in the smoke.
21 Q Let me jump ahead a little bit,
Dale, if you
22 don't mind. Exhibit 2806.
23   Excuse me for a moment, Dr. Solow.
Come back

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24 here. I'm not done with you.
25 A I'm not going anyplace.
03232
 1 Q Could you make that a larger --
the whole
 2 thing?
 3   This is on Brown & Williamson
letterhead
 4 April 26, 1985. Mr. J. A. B. Kellegher,
indicates he
 5 is with British American Tobacco Company
Limited in
 6 London, England.
 7   Dear Alan, regarding your letter
to Tom
 8 Whitehair, February of 19, 1958. The
bottom paragraph
 9 has a reference to Fact. Do you see there,
Fact?
10 A That's correct.
11 Q Is this the same product you are
talking
12 about?
13 A It is my understanding it is the
same
14 product. It is a low CO, CO being carbon
monoxide.
15 Q And this indicates -- we have
rarely
16 attempted to develop new products
specifically
17 attempted to deliver low carbon
monoxide, except
18 perhaps a proto Fact that was kept ready
on a turnkey
19 basis in the event of a marketing need of
such a
20 product. What is a turnkey basis?
21 A Turnkey basis is a basis that is
available at
22 the turn of a key, as it were, that is
not actually
23 being produced, but you are at the point
where you can
24 start up production very quickly if you
need to.
25 Q On a turnkey basis in the event
of a
03233
 1 marketing need for such product. That
explains how
 2 they did that. And then says, needless
to say, such
 3 need did not arise?
 4 A That's correct.
 5 Q Is withholding a product from
market which
 6 delivers lower carbon monoxide compared
to other
 7 cigarettes in the economic self-interest
of the firm
 8 that has that product?
 9 A Well, if consumers were

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concerned about the
10 amount of carbon monoxide that they were
inhaling when
11 they were smoking cigarettes, and if
consumers wanted
12 to smoke cigarettes that had a lower carbon
monoxide
13 delivery, then choosing not to produce such
a product
14 if you had one would not be in the
individual's
15 self-interest. You would expect to see
firms
16 explaining to consumers that lower carbon
monoxide
17 would be good for them, and that I have a
product that
18 can do that, and this is a good reason to
smoke your
19 product if you have the data to back that
up, that it
20 was in fact a lower carbon monoxide
product, and if
21 you had data to indicate that really was
better.
22 Q During opening statements by the
defendants
23 counsel represented that a Dr. Scheffman --
do you
24 know who Dr. Scheffman is?
25 A Yes, I know David Scheffman, who
Dr. David
03234
 1 Scheffman is.
 2 Q Dr. Scheffman testified it
wouldn't make any
 3 economic sense for a firm that had a safer
product to
 4 not market it. Do you agree with that? If
he
 5 testifies to that, would that be something
you would
 6 agree with?
 7 A What I have been trying to explain
all along
 8 is that a firm that has a safer product, a
product
 9 which consumers want to buy, would have an
interest in
10 producing that -- an individual interest in
producing
11 that.
12   The question is why would firms
not pursue
13 those profit opportunities. And we have
talked about
14 various profit opportunities that the
firms perceived
15 they would have if it they developed a
safer
16 cigarette. So it doesn't make any sense
to refrain
17 from doing that unless you are convinced

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that the
18 other firms are going to refrain from
doing it, too.
19 Q Who is Imperial Tobacco?
20 A Imperial Tobacco was a Canadian
tobacco
21 company.
22 Q Could we see Exhibit 2891.
23   Is Imperial Tobacco affiliated,
or is it
24 affiliated with any of the defendants in
this case?
25 A Imperial Tobacco was at one
point a
03235
 1 subsidiary of British American Tobacco,
and then
 2 eventually British American severed off
the majority
 3 of its holdings, but as I understand,
retained a
 4 minority interest. So they were less
than a fifty
 5 percent shareholder in Imperial Tobacco.
 6 Q Okay. Excuse me. Let me
consult with my
 7 handlers for a moment. Let's see. This
doesn't tell
 8 us a lot. It says confidential at the
top, and then
 9 it says secret -- it looks like Mr. F.
Harsh. Maybe
10 if we see the second page of this we can
learn a
11 little more about it. A note to Mr.
Crawford, secret
12 confidential. And do you understand Mr.
Crawford to
13 be an employee of Imperial Tobacco of
Canada?
14 A That's my understanding, yes.
15 Q Dale, I'm sorry. Can we see
page 3 of this
16 form just a moment, blow that up for us
just a little
17 bit, the whole page. Well, I wanted to
get the
18 signature block.
19   It says P. Sheehy, 18th
December, 1986. Do
20 you understand Mr. Sheehy to be an
executive with
21 BATCo?
22 A BATCo, and BAT Industry at some
point as
23 well. In fact, my understanding is he
was the
24 chairman of the board of BAT Industry at
one point.
25 Perhaps not at this point. I'm not sure
when he took
03236
 1 that position.

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Q Now can we go back to the previous page,
Dale?
Mr. Sheehy starts out by writing, you will
remember that when we last met in Montreal you spoke
about the approach that should be taken in fundamental
research to produce improved cigarettes. I have
reviewed the position with my colleagues. Since there
is such a wide discrepancy between your approach and
that of the rest of the group, I thought that I should
write to explain why it is that I cannot support your
contention that we should give a higher priority to
projects aimed at developing a safe cigarette as
perceived by those who claim our current product is
unsafe, by either eliminating or reducing to
acceptable levels all components claimed by four
critics to be carcinogenic.
Do you see that?
A I do. Sure.
Q Based on this statement in the document, did
you form a conclusion as -- an opinion as to whether
Imperial Tobacco was advocating research into a safer
cigarette?
A It certainly seems a reasonable conclusion to
draw, that they wanted to take -- they wanted to do
03237
fundamental research to produce improved cigarettes.
And by improved, the second paragraph certainly
suggests by improved they mean safer.
Q By the way, I don't want to create an unfair
inference here. Where it says group there, do you
understand that to mean a group of companies that are
owned by British American?
A That's correct. It is the British American
Tobacco group. As I understand it, that's the group.
Q And the second page -- or the next page.
Bring that part up, please.

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12 A second practical objection is that
13 attempting to develop a safe cigarette you are by
14 implication in danger of being interpreted as
15 accepting that the current product is unsafe. And
16 this is not a position that I think we should take.
17 Did you, based on your study in this case,
18 form an opinion as to whether what Mr. Sheehy -- I
19 guess it is Sir Patrick, is explaining in this
20 sentence is one of the reasons that this cartel
21 existed?
22 MR. WEBB: Objection. Lack of foundation.
23 THE COURT: Sustained.
24 BY MR. FERGUSON:
25 Q Have you seen other documents which reference
03238
1 this fear that advertising a product as safer would by
2 implication cast the other products as unsafe?
3 A Yes, that is a very common theme that runs
4 through the documents, starting roughly in the 1960s.
5 Q Okay. Do you know whether Imperial Tobacco
6 ever marketed a cigarette which was marketed as a
7 safer cigarette?
8 A No, I am not aware that they ever did.
9 Q Perhaps we can just put Imperial up here.
10 A (Complying.)
11 Q What's Liggett XA?
12 A We have spoken a little bit -- we have spoken
13 already a bit this morning about Liggett XA. Liggett
14 XA is the safer cigarette, the cigarette that the
15 Liggett & Myers company developed after it replicated
16 Dr. Wynder's mouse painting -- mouse skin painting
17 tests. And then went searching for a treatment of the
18 tobacco or some chemical that they could add or
19 whatever, such that when they added it to the tobacco
20 or treated the cigarette or changed the cigarette no

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21 more tumors were generated in the mice.
22 And they eventually found such a
treatment,
23 such a way of altering the cigarette, so
that when the
24 condensed smoke was painted on the backs of
the mice
25 the way you would do with other cigarettes,
for the
03239
1 treated cigarette you got really virtually
no cancer.
2 Q Now, the explanation may have
escaped the
3 jury, but XA is based on what, your review
of Liggett
4 & Myers research on the XA?
5 A That's right.
6 Q You reviewed the underlying
biological --
7 A I have read some of the scientific
documents
8 as well.
9 Q Would you write XA up here,
please? What's
10 the proposed brand name for that?
11 A Epic.
12 Q Epic. Why don't you put that
behind XA?
13 A (Complying.)
14 Q Was that product ever marketed?
15 A No, that product has never been
marketed.
16 Q During what period of time was
that being
17 developed?
18 A It depends on when you start
counting. I
19 mean Liggett & Myers started pretty much
immediately
20 after Dr. Wynder's. So this started in
the 1950s
21 doing the study. The time period at
which they had a
22 product was in the late 1970s. So by
1978 they were
23 getting awfully close to having a
product to market.
24 Q You said at a time when they
had a product.
25 They have had something that was almost
ready for
03240
1 market?
2 A They had something that they
were -- as I
3 understand it, were within months away
of actually
4 putting on the market.
5 Q Why don't you put that date up
here behind
6 Epic?
7 A 197- -- I am trying to remember

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whether it
 8 was '78 or '79. I am going to say
'78, I may be off.
 9 Q Now, the Ariel, Fact, and
the Imperial
10 product and Epic to the best of your
knowledge were
11 not marketed in the United States?
12 A That is my understanding.
13 Q Could you draw a line all
the way across the
14 page there?
15 A (Complying.)
16 Q I will ask you about some
products that were
17 marketed. What is Saratoga?
18 A Saratoga is a Philip Morris
product. That's
19 a product that reduced biological
activity, that was a
20 safer product, according to the
Philip Morris tests of
21 the product. And it was marketed and
had a small
22 market share.
23 Q Can we write Saratoga up
here, please?
24 A (Complying.)
25 Q Dale, would you bring up
Exhibit 439.
03241
 1 Now, you said that Saratoga
had a small
 2 market share, Dr. Solow. Yesterday
we looked at
 3 documents which predicted a larger market
share for
 4 cigarettes that had less biological
activity. We had
 5 this document up before. Why did Saratoga
not achieve
 6 the kind of market share that we saw
predicted in the
 7 documents yesterday?
 8   A The Philip Morris documents
reviewing what
 9 happened when Saratoga was marketed, Dr.
Wakeham, in
10 particular, pointed out while the product
was sold
11 Philip Morris never told the consumer that
this was a
12 safer product. So while it may have had
reduced
13 biological activity, while it may have
been safer in
14 some objective sense, the industry never -
- the firm,
15 Philip Morris, never told the story. And
customers
16 had no reason to choose this product over
other
17 products since they had no way to know

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that it was a
18 different, safer product, and as a result
they didn't
19 switch to it.
20 Q Let's look at the next page of
this document.
21 Can you make the whole document larger?
And then the
22 second paragraph which you have in yellow,
if you
23 could bring that up.
24 It says, with these tests as
criteria we did
25 put together a charcoal filter product
with
03242
 1 performance superior to anything in the
marketplace.
 2 That product was known as Saratoga.
Physiologically
 3 it was an outstanding cigarette.
Unfortunately, then
 4 after much discussion we decided not to
tell the
 5 physiological story which might have
appealed to a
 6 health conscious segment of the market.
The product
 7 as test marketed didn't have good, quote,
taste, close
 8 quote, and consequently was unacceptable to
the public
 9 ignorant of its physiological superiority.
10 Is this what you said wasn't
conveyed to the
11 public, why they should --
12 A That's correct. In the test
market they
13 didn't give the consumer a reason to switch
to this
14 product. And without such a reason, a
product doesn't
15 taste quite as good as your current
cigarette, and
16 if you have no other reason to switch to
it, customers
17 are going to stick with what they already
know and
18 already like.
19 Q Okay. Pardon me for talking with
a pen in my
20 mouth.
21 What is Premier?
22 A Premier is a device much like the
Ariel
23 device. It is the same basic principle,
what the
24 smoker inhales is not the result of burning
tobacco,
25 but rather the results of heating
something. And
03243
 1 again, there is an internal device, an

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internal object
 2 in the cigarette which contains, as I
understand it,
 3 nicotine and some glycerine to form a
vapor. And the
 4 smoker lights the end of the cigarette and
lights a
 5 heating device at the end of the cigarette.
That
 6 capsule gets warmed up and it generates a
vapor, not a
 7 smoke, but a vapor of glycerine and
nicotine. And
 8 that's what gets inhaled through some
tobacco. But
 9 the tobacco never burns, so the byproducts
of burning
10 tobacco, the cancer causing agents are
reduced.
11   So it is like Ariel in the 1960s,
it is a
12 device that provides a vapor by heating
rather than
13 burning tobacco.
14 Q All right. And have you reviewed
Reynolds'
15 documents with regard to the testing and
development
16 of the Premier?
17 A Yes, I have.
18 Q Have you reviewed as well
documents from
19 other cigarette manufacturers evaluating
the
20 performance of Premier?
21 A Yes.
22 Q Approximately when was the Premier
test
23 marketed?
24 A The Premier was test marketed in
the late
25 1980s, I believe, '88 I believe was the
date.
03244
 1 Q And I think during opening the
Eclipse
 2 cigarette was shown to the jury. Is that a
 3 development, as far as you can tell, from
the Premier
 4 product?
 5 A Yeah. My understanding is the
Eclipse
 6 cigarette is a very similar type of
product, much like
 7 the Premier, and it has just come out
recently. In
 8 fact, I think it is being test marketed in
one or two
 9 cities currently right now.
10 Q Can you resume your seat. Let's
put late
11 '80s. Is that what you said it was?
12 A Yes, I thought I said 1988.

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13 Q Why don't you resume your seat there?
14 Was the purpose of the Premier development
15 based on your study to reduce biological activity of
16 the smoke?
17 A I think the purpose of the development of the
18 product was to do that. The research and development
19 of the product.
20 Q Who is F. Russ Johnson?
21 A F. Russ Johnson is the CEO of R.J. Reynolds.
22 Q Maybe the former CEO?
23 A Former CEO.
24 Q Let's look -- would it be helpful for you to
25 listen to Mr. Johnson's testimony with regard to the
03245
1 purpose of the Premier development?
2 A Sure.
3 MR. KACZYNSKI: Your Honor, I object to this
4 procedure. It is hearsay, and at the time his
5 deposition was taken Mr. Johnson had no role at R.J.
6 Reynolds. In fact, he never had a role at R.J.
7 Reynolds, he was head of Nabisco, the parent company.
8 MR. FERGUSON: What we will offer is
9 deposition testimony, and the Court has ruled that
10 these portions could be used.
11 THE COURT: Admitted.
12 BY MR. FERGUSON:
13 Q Dale, could we see page 381, line 9, page 382
14 line 16 of Mr. Johnson's testimony. No, I'm sorry,
15 381, line 9. 382, line 16. Can you turn it up a
16 little bit?
17 Was the project under way at the time you
18 joined RJR/Nabisco?
19 A Yes.
20 Q Do you know how long it had been under way?
21 A No.
22 Q What was the concept?
23 A The concept was to try, and well, from the
24 time I arrived on of the scene it was to develop a
25 product that addressed itself to the problems, and the
03246

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1 bad guys, as we called it, from the regular
2 cigarettes. Could we design -- could we
engineer a
3 product that eliminated a lot of these
purported
4 problems in terms of health.
5 Question: Why did you want to
eliminate them
6 in terms of health? Did -- was the --
7 Answer: Because then you could
have a
8 product that would be much more attractive,
I would
9 think, to the audience. And also there the
-- in the
10 smoke side of it, I think one of the
biggest things
11 that started moving people off of
cigarettes is when
12 it really moved from being a health
problem to a
13 social problem. And a big part of that
social
14 problem, it was put together by the surgeon
general,
15 this whole thing on sidestream smoke.
16 So here was an opportunity to
perhaps bring a
17 product out that gave a lot of the
characteristics of
18 a -- of the standard cigarette and at the
same time
19 eliminated some of the social problems,
or one of the
20 big social problems.
21 Question: One of the goals was
to eliminate
22 the so called biological activity from
the smoke?
23 Answer: Whatever -- whatever
the bad guys
24 are in -- purported bad guys in the smoke
stream, to
25 develop a product that didn't have any
bad guys.
03247
1 Question: And you believed --
2 JUROR: Exhibit number?
3 MR. FERGUSON: This is the
deposition of F.
4 Russ Johnson.
5 Your Honor, we didn't play it.
Perhaps we
6 could stipulate that Mr. Johnson at the
time of the
7 development of the Premier was chief
executive officer
8 of RJR/Nabisco.
9 MR. LUVERA: The juror wants
to know if there
10 is an exhibit number.
11 MR. FERGUSON: There is no
exhibit number.

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MR. KACZYNSKI: At the time of the test marketing, he was the CEO of RJR/Nabisco.
MR. FERGUSON: Yes. Not at the time of the deposition.
BY MR. FERGUSON:
Q Was project Spa or the Premier project successful, Dr. Solow, in eliminating the bad guys, as Mr. Johnson put it?
A Yes, my understanding was it was a biologically superior product, it had fewer of the bad guys, the harmful products in the smoke.
Q And was there a consumer demand for a cigarette with less of the bad guys in it?
A Well, I think that we have seen lots of
03248
evidence to suggest that consumers were concerned about the health consequences of smoking and that there was a market opportunity for someone who could provide a product that gave consumers the benefits and gave consumers a reason to switch for their own health to a less poisonous, a less toxicological cigarette.
Q Let's see if Mr. Johnson thought there was a consumer demand. Dale, could we see page 382, line 17, 383, line 11?
MR. LUVERA: Are we in the same deposition?
MR. FERGUSON: Yes, the deposition of Mr. Johnson.
Question: And you believe there was consumer demand for such a product?
Answer: I believe it could be created.
Question: How would you -- how did you plan on developing consumer demand for that product?
Answer: First of all, create the product. Certain things would be obvious from the beginning, starting with the whole issue of smoke itself, which

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21 would give an awareness to an individual that this is
22 -- and then of course through all the various
23 scientific areas, go through all the characteristics
24 of this product versus the -- versus the, let's say,
25 the traditional product.
03249
 1   Question: So you would -- you would expect a
 2 consumer to understand or be aware of the various
 3 features of the product as developed?
 4   Answer: Yes, because of the publicity that
 5 would surround it, by the fact that you have got a
 6 product that's very unique, by sampling.
 7   BY MR. FERGUSON:
 8 Q Was that Mr. Johnson buzzing, or was that me?
 9 A It certainly wasn't me.
10 Q Do you have an opinion as to whether
11 consumers would trade off some features in a product
12 in return for some perceived --
13   MR. KACZYNSKI: Your Honor, I will object.
14   THE COURT: Sustained.
15   BY MR. FERGUSON:
16 Q Do you as an economist frequently study the
17 response of consumers to various dimensions of
18 competition?
19 A Yes, it is an old and well understood part of
20 economic analysis of consumer demand. It goes back to
21 work by Professor Lancaster who suggested that we
22 could think of products as having different
23 characteristics. And each particular product brings a
24 different set of characteristics. Let's think about
25 cars, some are big, some are fast, some are
03250
 1 comfortable, some are flashy. And consumers are
 2 willing to trade off different characteristics. You
 3 can't have everything sometimes, often. So consumers
 4 pick and choose the mix of characteristics that they
 5 would like.
 6   Q Let's see, Philip Morris, Mr. Johnson thought

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7 consumers would trade off something with regard to
8 Premier. Dale, can we see Mr. Johnson's deposition,
9 page 386, line 23, to page 387, line 14?
10 Question: Did you believe that customers
11 would be willing to trade off some aspects of the
12 product in order to achieve what you regarded as the
13 benefits of the Premier product?
14 Answer: I thought there was a high
15 probability that would happen.
16 Question: So you thought the customers might
17 put up with a little bit of an off scent?
18 Answer: Or whatever. You only know when
19 they put their money up, and then they tell you.
20 Question: But that would be a reasonable
21 thing to expect?
22 Answer: Oh, yes, yeah. I --
23 Question: Much as people will.
24 Answer: I felt very comfortable with the
25 program.
03251
1 Question: Many of us drink skim milk even
2 though we don't like it?
3 BY MR. FERGUSON:
4 Q Now, the Premier product was test marketed,
5 Dr. Solow?
6 A I believe it was test marketed for a few
7 months in two cities.
8 Q And what happened at the end of that couple
9 of months, few months?
10 A It didn't sell very well, and it was
11 withdrawn from the market.
12 Q Do you have an opinion as to whether that was
13 an adequate test marketing period of time?
14 MR. KACZYNSKI: Objection. Foundation.
15 THE COURT: Sustained.
16 BY MR. FERGUSON:
17 Q Let's see if Mr. Johnson thought it was a
18 sufficient period of time. Dale, page 386, line 12,
19 to 384, line 25 of Mr. Johnson's deposition. Page
20 386, line 23, to page 387 line 14.
21 Question: Did you believe that customers

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22 would be willing to trade off some
aspects of the
23 product in order to achieve what you
regarded as --
24 Stop. I thought I was so smart
here. I
25 apologize. Counsel, you are right. I
apologize to
03252
1 the jury and the Court.
2 Page 383, line 12 to page 384 line
25.
3 Question: Was there a project
director for
4 Spa?
5 Answer: Yeah.
6 Question: What was that?
7 Answer: God, we saw his name the
other day.
8 What was the name?
9 Kampe, Kampe, K-a-m-p-e?
10 MR. FERGUSON: What happened?
11 Question: I think you alluded to
the fact
12 that Premier was test marketed in two
cities?
13 Answer: Yes.
14 Question: And those were
Cincinnati and
15 where?
16 Answer: I think Cincinnati was
one, I think
17 one was in Phoenix, but you'd have to find
it.
18 Question: Was there an effort to
ban the
19 product in the State of Missouri?
20 Answer: Oh, there could have
been. You
21 know, zealots, of course a lot of them
hated this, the
22 fact that this was a product that
eliminated, say,
23 ninety percent of the problem, just made
them furious.
24 They'd rather you stay with a product
that, say, had
25 one hundred percent of the problems.
03253
1 Question: How long was Premier
in the test
2 marketing?
3 Answer: I think about two
months, and then
4 two things happened. They went into test,
let's say,
5 at the end of the September, but by the
end of
6 November you had new ownership of the
company.
7 September of 1988 and November of '88 you
have a new
8 owner.

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Question: That was not an adequate test marketing period, in your opinion?
Answer: No. Also with a new product, very seldom do you take a new product and it hits the market and takes off. They -- as I think I pointed out earlier, you really have to hold this thing by the hand and bring it along, because you are going to learn things from the consumers that with all the research you do ahead of time, with all the other activity and all the money you spend on advertising, you miss something.
Question: You personally approved the Premier test marketing program?
Answer: Yes.
BY MR. FERGUSON:
Q Now, there was some reference, Dr. Solow, to the poor taste of the Premier product?

03254

A Yes, some of the documents referring to the evaluation of the test marketing had some concerns about taste.
Q Did Reynolds, based on your study, believe it had solved the poor taste problem?
A Yes, my understanding is they felt they could solve that problem.
Q Did any of the other companies -- Strike that.
Why did Premier fail, in your opinion, based on your study?
MR. SCHIFFERMAN: Objection. Lack of foundation. Calls for speculation.
THE COURT: Sustained, without further foundation.
BY MR. FERGUSON:
Q Did you review documents as part of your study where several companies evaluated the failure of Premier to succeed in the test marketing period?
A Yes.
Q Did you review Philip Morris documents evaluating that failure?

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23 A There was a Philip Morris evaluation of what
24 happened with Premier.
25 Q Did you review Lorillard documents evaluating
03255
 1 that failure?
 2 A There was a Lorillard evaluation of the
 3 failure of Premier.
 4 Q Did you review Reynolds documents evaluating
 5 that failure?
 6 A Yes, there was Reynolds documents as well.
 7 Q Based on your study of those evaluations,
 8 were you able to reach a conclusion as to the reasons
 9 for the Premier failure?
10 A Yes, I have an opinion as to why, based on my
11 review of those documents I have an opinion as to why
12 Premier failed.
13 Q And what was your opinion in that regard?
14 A I think the primary reason that Premier
15 failed is that the safety case, the less of the bad
16 guys case, let's say ninety percent fewer problems
17 case that Mr. Johnson mentioned, was not made to
18 consumers.
19   Consumers were offered this product and
20 largely told that it was cleaner, you wouldn't get
21 ashes on the carpet, you wouldn't fill up the room
22 with smoke, but they never said -- they really never
23 made the case to consumers about what would go into
24 their lungs. And consumers, not perceiving there was
25 a health benefit to themselves, didn't see enough of a
03256
 1 benefit to offset the costs to themselves of switching
 2 to a different product that didn't taste quite the
 3 same and was different, and so forth.
 4 And they -- without a reason to switch to it
 5 they weren't willing to make the change.
 6   Q Let's see why Mr. Johnson thought Premier
 7 failed. Dale, could we see F. Russ Johnson's

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8 deposition, page 387 line 15 to 389 line 3.
9 Question: Do you believe that RJR did not
10 effectively communicate the relative advantage of the
11 Premier over other brands?
12 Answer: It was just too soon to tell. You
13 know, I mean it was just out as a novelty, you know,
14 it just -- it would take time.
15 Question: Prior to the entrance of the new
16 owner, was RJR rethinking the fashion in which it was
17 going to communicate the advantages of the product?
18 Answer: Oh, we knew it had problems out
19 there in the marketplace, yeah. I figured it would be
20 about a good two year project before you really had
21 the thing in line.
22 Question: What kinds of things did you have
23 in mind to change the way the advantages of the
24 product were being communicated?
25 Answer: Well, we were going to have to
03257
1 change the ignition system, we were going to have to
2 -- that became pretty obvious from the beginning.
3 Question: Because it was difficult keeping
4 lit?
5 Answer: Well, yeah, well, and then that
6 would cause in turn, you know, people used the
7 traditional method of lighting up, and that created a
8 lot of the odor that came off it because you're
9 burning plastic.
10 Question: Had you given thought to how to
11 convey to the public the fact that the product didn't
12 have the same biological activity resultant from its
13 use as regular cigarettes?
14 Answer: Yeah, we would -- we would -- we
15 would do seminars on the product and the impact in the
16 -- to various medical bodies who in turn could do
17 their own analysis and come up with their

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18 recommendations one way or another.
19 Question: So you were
hopeful --
20 Answer: We thought they
would be favorable.
21 Question: You were hopeful
that the medical
22 community would undertake to do that
for you?
23 Answer: Yes. We were
fairly sure they
24 would.
25   BY MR. FERGUSON:
03258
 1 Q Did Philip Morris in its
assessment of
 2 Premier believe or opine whether
Reynolds had
 3 successfully extolled the virtues of
Premier?
 4 A No. My understanding from the
Philip Morris
 5 evaluation is that Philip Morris believed
that
 6 Reynolds had not done a good job of
explaining the
 7 health benefits to consumers, and that had
left the
 8 consumer disappointed in the product.
 9 Q In the interest of time, I want to
ask you --
10 have you formed an opinion as to what the
industry in
11 the United States would look like if it
were
12 competitive?
13 A On any particular dimension of
competition?
14 Q Well, let's refer back -- by the
way, on this
15 chart of safer cigarettes that you
prepared, Ariel,
16 Fact, et cetera, this is based on your
study in this
17 case?
18 A Study of things that have gone
on in the
19 industry, yes.
20 Q And is this chart useful to help
illustrate
21 your testimony?
22 A Sure.
23   MR. FERGUSON: Your Honor, we
would offer
24 this chart as the next exhibit in order.
25   MR. WEBB: No objection for
illustrative
03259
 1 purposes.
 2 THE COURT: Admitted.
 3   (Exhibit 5020
was
 4   received in

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evidence.)
BY MR. FERGUSON:
Q Let's look back at your chart here, which is Washington DEM5020. It has the four arrangements listed. What would this industry -- do you have an opinion as to what the American cigarette industry would look like if it were competitive on the basis of health?
MR. WEBB: Objection, unless we have some time period.
MR. SCHIFFERMAN: Also lacks foundation and is speculative.
MR. FERGUSON: The time period would be presently.
THE COURT: Overruled.
THE WITNESS: I think in all likelihood if the industry had been competing on the basis of health and safety it would be competing on the basis of advertisements about health, had been doing the testing it would need to do in order to evaluate the safety of its products and so forth, that the industry -- that the industry would look considerably
03260
different.
I think in all likelihood we might -- not we, because I am not a smoker -- but smokers might all be smoking things like XA, had that made it to the market, they might be smoking things like Saratoga.
Some people would -- who would have discovered and had their beliefs confirmed earlier on about the safety of smoking in general might not be smoking at all.
I think in all likelihood had the industry continued to compete on the basis of health advertising -- truthful health advertising there would have been more people quitting smoking and fewer people beginning smoking.
And so as a general matter the

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industry would
16 look quite different, and the products
would in fact
17 look quite different. And this is an
industry that
18 markets things very well when it wants
to, and is
19 quite capable when it wants to of
expressing the
20 benefits that it perceives of its
products.
21 And I think had they taken --
as I said
22 yesterday, I think in the 1950s -- 1953
there was a
23 crossroads was reached. And had the
industry followed
24 the path taken by Liggett & Myers, for
example, to
25 take the science seriously and to discover
whether in
03261
 1 fact there was a link between smoking and
cancer, and
 2 if so what could they do about that, the
industry
 3 would in all likelihood look very different
today.
 4 Q Can we have Exhibit 6202, please.
 5   Have you seen this document
before, Dr.
 6 Solow?
 7 A Sure.
 8 Q It says, introducing Fact -- and
that is one
 9 of the safer cigarettes you brought up here
-- the low
10 gas low tar cigarette.
11   Do you have an understanding that
this was a
12 proposed ad copy of an ad that never ran?
13 A Yes, my understanding is this is a
mockup of
14 a potential ad for Fact that -- somebody
said, well,
15 how are we going to sell this low carbon
monoxide
16 cigarette? And some advertising person
came up with
17 this idea, but that it was never used.
18 Q Let's look at a couple others.
Exhibit 6203,
19 please.
20   Is this also a Fact ad copy that
you looked
21 at?
22 A Yes, it is a variation on the same
theme. It
23 points out that if you are concerned about
smoking,
24 here is what some of the benefits -- it
helps to tell
25 the consumer what the benefits of

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smoking the Fact
03262
1 cigarette would be. It doesn't actually talk about
2 carbon monoxide. It talks about gas. And this is
3 another mockup. This campaign was never run.
4 Q Does this ad make specific health claims?
5 A I think it is certainly moving in that
6 direction. It says smoke is over ninety percent gas,
7 more than a hundred kinds of gases. And many critics
8 say cutting down on some of the gases is just as
9 important as lowering tar and nicotine and so forth.
10 Q Let's look at 62- -- I'm sorry?
11 A That's fine.
12 Q -- 6204, please. This starts out at the top,
13 says head, introducing Fact. Do you understand this
14 to be the typed version of the proposed advertising
15 copy?
16 A Yeah. This is another -- it is not quite so
17 artistically pretty, but another mockup of a potential
18 ad copy for a Fact ad.
19 Q Okay. Here you see smoke is mostly gas,
20 different kinds of gas, and these critics say it is
21 just as important to cut down on some of the gases as
22 it is to lower tar and nicotine. No ordinary
23 cigarette can do it, but Fact can.
24 As far as you know, was this ever run?
25 A No. My understanding is this campaign was
03263
1 never run.
2 Q 6205. Would you enlarge that, please, Dale?
3 Is this the same kind of thing, Dr. Solow.
4 Apparently proposed ad copy for Fact cigarette?
5 A Yes. And this one is -- goes into a little
6 bit more explanation about what the filter is that
7 removed the carbon dioxide, the duolite material.
8 Q This one is a little technical. It is

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talking about hydrogen cyanide, aldehydes and the fact that these things apparently are present in cigarette smoke, isn't it?
A Yes. It goes beyond calling it gas. And it doesn't -- it refers to carbon monoxide, but also things like hydrogen cyanide.
Q And it says Fact takes that stuff out?
A Yes. That stuff -- those are some of the bad guys, I suppose, harmful substances and those are drawn into the granules of this purite material, and they stay in the filter, and they don't go into you.
Q In your expert opinion, Dr. Solow, based on your study in this case and your experience and education, would the Fact advertisements we have just looked at be the kind of advertising that you would expect to see, more probably than not, if the American cigarette industry competed on the basis of health?
03264
A Yes. This is -- this is in the same sort of vein as the health advertising that we saw in the 50s, but a little bit more technical, I think, talking about the particular substances that were involved.
And, again, presuming that there is data to back this up, that it is actually true, that Fact removed hydrogen cyanide and aldehydes, then I would expect that you would see this kind of advertising.
Q Okay. Can I see Exhibit 2763, please.
Have you seen this document before, Dr. Solow?
A Yes, I have.
Q It refers to something called Project Day.
And do you understand Project Day to be a project by Brown & Williamson to develop a less biologically active cigarette?
A That's my understanding, yes.

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Q It says Project Day will explore potential alternatives to conventional cigarettes that credibly offer the elements of traditional tobacco pleasure with a greater level of safety.
Could we go back one, two, three, to the fourth page, please, Dale?
The brands listed here are duMaurier, Quest, Matinee, those are Canadian brands, aren't they?

03265

A I believe that is true, yes.
Q Do you understand that what is being discussed here is potential marketing of a safer product in Canada?
A This would have been a Canadian version of the safer cigarette.
Q Finally, the perfect combination of what tastes best and what is better for you, correct?
A That's what it says.
Q And the next page, please, Dale.
This is new nontobacco cigarette. Offers good tradeoff. Introducing Advent. Give up a minimum of tobacco taste and significantly reduce undesirable tars and gases, right?
A Yes.
Q It says over here it is made from one hundred percent synthetic tobacco?
A Yes. It illustrates the tradeoff concept, again. Trade off a little taste, a minimum of taste for a health benefit.
Q Let's look at the next page here. You will like these substitutes, margarine, Nutrasweet, you'll love this one, Sherbrooke. Introducing Sherbrooke, the first great tasting nontobacco cigarette made with natural grain fiber.

03266

Is this the kind of tradeoff you are talking about?
A Yes. People consume margarine, may not taste as good as butter, but at least some people think it

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5 is better for you. Certainly Nutrasweet doesn't taste
6 quite the same as sugar for some people, but it is
7 lower calorie and some people are willing to make that
8 tradeoff. Some people drink regular Coke, some people
9 drink diet Coke. This is the same principle applied
10 to a cigarette product.
11 Q Next page, please.
12 Technological breakthrough. The first filter
13 system that helps resolve the dilemma between what
14 tastes good and what's better for you. New Zenith,
15 full of flavor and very little else. This is a
16 cutaway picture of a filter here. And it says
17 cellulose, reduces tar?
18 A Charcoal, actually.
19 Q It says cellulose?
20 A I'm sorry.
21 Q Charcoal on this end, reduces gases. And in
22 the middle it says palladium reduces carbon monoxide.
23 What was added to the XA by Liggett to reduce
24 the biological activity of that smoke?
25 A It was a palladium compound, palladium
03267
1 nitrate, a salt of palladium, if you will. It was a
2 palladium compound.
3 Q There are more ads for Project Day, but you
4 are familiar with those. Are these Project Day
5 advertisements that we have been looking at with the
6 jury the kinds of advertisements that you would, in
7 your opinion, more probably than not expect to see if
8 the American cigarette industry competed on the basis
9 of health?
10 A Yes. I mean, I don't know whether these are
11 the particular products that would have emerged, but I
12 think that it is fair to say that safer products are
13 much more likely -- safer products would have emerged.
14 And they would have been advertised in this kind of
15 fashion, with the -- if firms were

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actually competing
16 on the basis of health claims. Firms
would be
17 actively promoting to the consumers the
benefit of
18 smoking the safer cigarette.
19 MR. FERGUSON: Your Honor, I
think we have
20 all had a long day, and I suggest we call
it quits for
21 the day.
22 THE COURT: See you at 9:00
23 (Evening recess.)
03268
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2 STATE OF WASHINGTON)
3 COUNTY OF KING)
4 _____)
5
6
7 We, James D. Lavielle, RPR, CSR,
Barry Fanning,
8 RPR, Official Court Reporters for the Superior
Court,

9
State of Washington, hereby certify that the foregoing
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comprises a full, true and correct transcription of my
1
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stenographic notes taken in the above-entitled cause.
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Dated this 20th day of October, 1998.
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OFFICIAL COURT REPORTER
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James D. Lavielle, RPR, CSR
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